

Spring 2007

Tearing the Fabric of the World Trade Organization: United States - Subsidies on Upland Cotton

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Michael J. Shumaker, *Tearing the Fabric of the World Trade Organization: United States - Subsidies on Upland Cotton*, 32 N.C. J. INT'L L. & COM. REG. 547 (2006).

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Tearing the Fabric of the World Trade Organization: United States - Subsidies on Upland Cotton

Cover Page Footnote

International Law; Commercial Law; Law

Tearing the Fabric of the World Trade Organization: *United States—Subsidies on Upland Cotton*[†]

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[†] I would like to thank my parents, family, and friends for their support and patience during the writing process. In addition, much is owed to the research assistance of Shaun Duignan, the editorial advice of Diane Standaert, and the mentoring of Professor Melissa Jacoby. Finally, I would also like to thank KCH and BMF for giving me my first shot—this article would never have happened without it. Any errors are mine alone.

I. Introduction

Since the advent of the World Trade Organization (WTO) in 1995,¹ efforts to broaden participation have largely succeeded, seeing membership rise to a total of 148 members as of February 2005.² This constitutes an increase of 20 from the 128 original “contracting parties” who signed the General Agreement on Tariffs and Trade (GATT) in 1994 that created the WTO.³ This expansion, however, has not come without bumps in the road. One primary obstacle is the continued tension between so-called “developed” and “developing” countries, which has led to deadlock within the WTO process.⁴ At present, the WTO is considering proposals to make the negotiation process more transparent and geographically inclusive,⁵ which could reflect the ongoing tensions between world economic powers and developing nations within the negotiations.⁶

Though the ongoing negotiations can still be wrapped in secrecy, the process of resolving disputes under the WTO’s Dispute Settlement Understanding (DSU) is subject to a highly formalistic legal process.⁷ From aircraft to agricultural products, pet food to periodicals, countries seeking to correct violations of the general WTO agreement have successfully used the dispute settlement process to further their interests.⁸ The sheer volume of

¹ See, e.g., MITSUO MATSUSHITA, THOMAS J. SCHOENBAUM & PETROS C. MATROVIDIS, *THE WORLD TRADE ORGANIZATION: LAW PRACTICE AND POLICY* 7 (2006).

² Members and Observers, WTO, http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (last visited Mar. 5, 2007).

³ The 128 Countries That Had Signed GATT by 1994, http://www.wto.org/english/thewto_e/gattmem_e.htm (last visited Mar. 5, 2007).

⁴ MATSUSHITA ET AL., *supra* note 1, at 14-15.

⁵ MATSUSHITA ET AL., *supra* note 1, at 14-17.

⁶ See *infra* Section V.

⁷ See generally Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2 [hereinafter DSU], available at http://www.wto.org/english/docs_e/legal_e/28-dsu.pdf.

⁸ For a full cataloging of goods and services that have been subject to the dispute resolution process, see Dispute Settlement: Index of Disputes, http://www.wto.org/english/tratop_e/dispu_e/dispu_subjects_index_e.htm. In many ways, the availability of this information draws the sharpest contrast between the general negotiation and dispute resolution processes.

disputes, as well as the concentration of claims against two parties—the United States and the European Community (EC)—indicates that the developing world has a new tool at its disposal to pursue its concerns internationally.⁹

One particularly challenging area for progress in the trade liberalization process is agriculture; in many ways it is ground zero for the recurring conflict between developed and developing nations. As one commentator explains,

Agriculture is a sensitive topic in virtually every country. In general, agricultural products are easily exported, so the potential for trade is vast. Yet, every country seeks to maximize economic advantages for its own agricultural sector for social, economic and political reasons. Thus, agricultural trade has been a topic of almost continuous negotiations and was singled out for special treatment even in the GATT 1947.¹⁰

In particular, developing countries have few opportunities other than agriculture for trade and development¹¹ while developed countries seek to defend their rapidly diminishing competitive advantage in agricultural production.¹² The same can be said for developing countries attempting to invest in textiles as a first step in the industrialization process.¹³

As such, the recent dispute between the United States and Brazil over American subsidies on upland cotton falls at the intersection of all these issues¹⁴ and may portend a change in conventional thinking about international trade. Accordingly, this

⁹ See generally *Dispute Settlement: The Disputes, Disputes by Country*, http://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm. Since its inception, 46 nations have brought over 330 claims, with the United States or EC acting as complainant or respondent in roughly half of all disputes brought. *Id.*

¹⁰ MATSUSHITA ET. AL., *supra* note 1, at 135.

¹¹ THE WTO, *DEVELOPING COUNTRIES AND THE DOHA AGENDA: PROSPECTS AND CHALLENGES FOR TRADE-LED GROWTH* 39-40 (Basudeb Guha-Khasnobis ed., 2004) (estimating that fully one-sixth of all welfare gains from trade liberalization for developing countries will come from reformed farm policies) [hereinafter *DOHA Agenda*].

¹² See MATSUSHITA ET AL., *supra* note 1, at 135, 140-41.

¹³ *DOHA Agenda*, *supra* note 11, at 40.

¹⁴ See generally Appellate Body Report, *United States—Subsidies on Upland Cotton*, WT/DS 267/AB/R (Mar. 3, 2005) [hereinafter *Appellate Body Cotton Report*], available at http://www.wto.org/english/tratop_e/dispu_e/267abr_e.pdf.

comment will compare the American cotton subsidy program and U.S. commitments under the WTO Agreement on Agriculture, then it will discuss the WTO dispute resolution process and its ability to bind member nations legally. After an in-depth examination of the U.S.-Brazil upland cotton dispute, this comment will examine both the immediate fallout from the case and discuss the future to determine the potential impact of this case on the current Doha Round negotiations and future reform of the WTO.

II. American Cotton Production—Market Dynamics and Federal Subsidies

A. General Statistics

In general, cotton production in the United States is limited to the southern region of the country, stretching from Virginia down through the Carolinas, continuing through Georgia, and winding westward through a belt of contiguous states to California.¹⁵ In recent years, the cash receipts from U.S. cotton production have averaged roughly \$4.7 billion annually.¹⁶ One of the most significant value-added crops in the United States, the retail value of the 8.2 billion pounds of cotton harvested, processed, and handled domestically is nearly \$120 billion annually.¹⁷

The United States is the world's largest cotton exporter, accounting for 25% of the world's cotton trade, with 40% of American raw cotton scheduled for export markets.¹⁸ However, in recent years, the United States' seeming advantage in cotton exports has eroded. Despite utilizing increasingly mechanized cultivation techniques, cotton production is still heavily labor intensive.¹⁹ In fact, labor costs are one of the key factors in

¹⁵ See National Cotton Council of America, *Where Cotton Grows*, <http://www.cotton.org/pubs/cottoncounts/story/where.cfm>.

¹⁶ National Cotton Women's Committee, *Cotton Counts*, <http://www.cotton.org/pubs/cottoncounts/upload/Cotton-Counts.pdf>.

¹⁷ *Id.*

¹⁸ NORA L. BROOKS, ECONOMIC RESEARCH SERVICE, USDA CHARACTERISTICS AND PRODUCTION COSTS OF U.S. COTTON FARMS 2 (2001), <http://www.ers.usda.gov/publications/sb974-2/sb974-2.pdf>.

¹⁹ *Id.* at 5.

determining the domestic competitiveness of U.S. producers.²⁰ In addition, general input prices, including the cost of the seed, fertilizer, pest and weed control, as well as gasoline, have put additional upward pressure on U.S. production costs.²¹

While global demand for cotton continues to out-pace supply,²² global production continues to grow throughout the developing world, with world exports expected to increase by nearly 15% between 2005 and 2006.²³ In particular, developing countries like China, India, and Brazil are adding significantly to both the world supply and demand for cotton.²⁴ This is in contrast to the United States, which continues to increase exports, as its textile industry gradually declines in the face of competition from global competitors.²⁵

One of the main reasons for the burgeoning foreign textile industry is the recent expiration of the MultiFibre Arrangement (MFA) created under the GATT. Under this agreement, the MFA “allowed states to impose high quotas on imported clothing and textiles.”²⁶ With the MFA’s expiration, textiles and apparel will be integrated into the normal WTO framework over the next ten

²⁰ *Id.*

²¹ See generally GARY ADAMS, STEVE SLINSKY, SHAWN BOYD & MICHELLE HUFFMAN, SOLUTIONS THROUGH STRENGTH: THE ECONOMIC OUTLOOK FOR U.S. COTTON, 47-49 (2004), <http://www.cotton.org/econ/upload/Economic-Outlook-for-U-S-Cotton-2004.pdf>.

²² *Id.* at 48.

²³ USDA, Foreign Ag. Serv., *Cotton: World Markets and Trade, U.S. Market Share Likely Declines in 2005/06* [hereinafter *World Markets and Trade*], available at <http://www.fas.usda.gov/cotton/circular/2005/10/toc.htm>.

²⁴ See generally ADAMS ET AL., *supra* note 21, at 35-42. China is both the world’s largest cotton producer and supplier, producing roughly 20 billion bales annually, and consuming over 30 billion bales in 2004. *Id.* Likewise, India, which produces and consumes roughly 13 billion bales annually, and Brazil, which produces five billion bales, and consumes roughly three billion bales, have made large gains in production in order to keep pace with domestic demand. *Id.* Increased demand, in combination with strong global prices, have spurred all three nations to plant additional acres of cotton in recent years. *Id.*

²⁵ *Id.* at 24-25. In 2002, U.S. apparel production decreased by 12.9%, and home furnishings fell by 5.7%, with nearly 92 textile mills closing in 2002 and 2003 alone, shedding some 200,000 employees in the process. *Id.*

²⁶ MATSUSHITA ET AL., *supra* note 1, at 141.

years, eliminating the high quotas.²⁷ While it is too early to analyze its economic effects, the United States scrambled to complete bilateral textile negotiations to provide interim treatment and quotas on Chinese textile products at the request of Members of Congress from textile producing states.²⁸ With the growth in China's supply and demand for cotton,²⁹ it is unlikely that the expiration of the MFA and the United States' urgency in moving to bilateral negotiations was merely coincidental.

To summarize, the U.S. cotton industry faces increasingly stiff global competition as developing countries expand domestic production and consumption. Foreign apparel production is likely to grow with the expiration of the MFA, which allowed protective tariffs and quotas on apparel and textile products.³⁰ Finally, while the global market for cotton continues to grow with expectations of greater demand, another of the United States' competitive advantages comes under attack—its generous program of domestic subsidies and marketing promotion payments to domestic cotton producers.³¹

B. The U.S. Cotton Program: Domestic Marketing Payments and Export Subsidies

The Farm Security and Rural Investment Act of 2002 provides for multiple levels of payment support and marketing assistance for cotton producers.³² As a result, the United States Department

²⁷ *Id.*; see also WTO, Textiles Monitoring Body (TMB) *The Agreement on Textiles and Clothing*, http://www.wto.org/english/tratop_e/texti_e/texintro_e.htm. The framework under the GATT was known as the MFA. The provisional document bridging the GATT and the WTO Agreement is known as the WTO Agreement on Textiles and Clothing (ATC). *Id.* Most commentators, including this one, continue to address the agreement in its previous name, the MFA.

²⁸ WTO, *Facts on Textiles: Benefits from Establishing Quotas on Certain Chinese Apparel Exports to the United States*, http://www.ustr.gov/assets/Document_Library/Fact_Sheets/2005/asset_upload_file813_8339.pdf. It appears as well that such bilateral agreements are permitted by the MFA and the general WTO framework, as the MFA called for "fair and equitable trading conditions," which are likely from a bilateral agreement. See WTO, *A Summary of the Final Act of the Uruguay Round*, http://www.wto.org/english/docs_e/legal_e/ursum_e.htm#cAgreement.

²⁹ See ADAMS ET AL., *supra* note 21, at 34-35, 40-41.

³⁰ MATSUSHITA ET AL., *supra* note 1, at 141.

³¹ See generally Appellate Body Cotton Report, *supra* note 14.

³² Farm Security and Rural Investment Act of 2002, 7 U.S.C. § 7901 (2005)

of Agriculture (USDA) expenditures for cotton averaged nearly \$3 billion annually between 2000 and 2003.³³ Understanding the scope of U.S. commodity programs is essential to understanding U.S. commitments under the WTO Agreement on Agriculture, which is explained below in section II.C.

Enrollment in USDA commodity programs is optional for farmers, but nearly all producers take advantage of the multi-layered commodity program to facilitate their annual production.³⁴ Current programs are in sharp contrast to the New Deal-era policies of income and price support, which, along with strict supply management in the form of acreage limits and storage programs, ended with the passage of the 1996 Farm Bill.³⁵ Following a similar philosophy as the 1996 law, the 2002 Farm Bill provides direct payments to farmers based on historical acreage estimates, rather than on current production or commodity supply concerns.³⁶ Producers who enroll in the program can update their acreage using an average of their acreage planted in the 1998 through 2001 crop years.³⁷ Direct payments are paid regardless of commodity price, and are based on a payment rate set by the 2002 Farm Bill.³⁸

[hereinafter 2002 Farm Bill].

³³ USDA, Farm Service Agency, *CCC Net Outlays by Commodity and Function*, Table 35 http://www.fsa.usda.gov/Internet/FSA_File/ccc2_msr2007_table35pdf.pdf. Cf. *Cotton Counts*, *supra* note 16 (stating that total cash receipts for annual U.S. cotton production average nearly \$4.7 billion).

³⁴ See generally Anne B. W. Effland, *U.S. Farm Policy: The First 200 Years*, AGRICULTURAL OUTLOOK, March 2000, at 25, available at <http://www.ers.usda.gov/publications/agoutlook/mar2000/ao269g.pdf>.

³⁵ *Id.* at 24; see also USDA, Economic Research Service, Briefing Rooms, *Farm and Commodity Policy: Background and Issues*, <http://www.ers.usda.gov/Briefing/FarmPolicy/background.htm>.

³⁶ USDA Farm Service Agency, *Upland Cotton: Summary of 2002 Commodity Loan and Payment Program*, available at www.cotton.org/econ/cropinfo/upload/upcot03.pdf.

³⁷ *Id.*

³⁸ *Id.*; see also USDA, Economic Research Service, *2002 Farm Bill: Analysis of Selected Provisions: Direct Payments*, <http://www.ers.usda.gov/Features/farmbill/analysis/DirectPayments2002act.htm>. The formula for calculating direct payments for cotton can be expressed as follows:

$$DP_{\text{cotton}} = (\text{payment rate})_{\text{cotton}} \times (\text{payment yield})_{\text{cotton}} \times ([\text{Base acres}]_{\text{cotton}} \times 0.85)$$

Cotton's payment rate, as provided in the 2002 Farm Bill, is roughly 7 cents per pound.

Following passage of the 1996 Farm Bill, Congress authorized nearly \$30 billion in emergency assistance over the course of four years to farmers due to low market price and natural disaster.³⁹ Responding to the ad hoc payments that provided uncertain relief to producers, the 2002 Farm Bill added to the direct payment program.⁴⁰ The 2002 law created a new program of counter-cyclical payments to producers.⁴¹ Its purpose was to provide a more stable safety net for farmers transitioning to a more market-based approach to farming without the acreage restrictions that were a feature of prior farm programs.⁴² Similar to direct payments, counter-cyclical payments are based on a historical average of payment yields from 1998 through 2001.⁴³ Unlike direct payments, which are paid in full regardless of the "effective price" for a commodity,⁴⁴ the USDA makes counter-cyclical payments whenever the market price of the commodity falls below a statutorily determined target price.⁴⁵

Id. It is unclear how this rate was determined, whether by actual demonstrated need or out of budgetary expedience.

³⁹ Press Release, House Committee on Agriculture, *Farm Bill Final Passage: President Praises Legislation; Awaits Senate to Concur* (May 2, 2002), available at <http://agriculture.house.gov/press/107/pr020502.html>.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ USDA, Economic Research Service, Briefing Rooms, *Farm and Commodity Policy: Program Provisions, Counter Cyclical Income Payments* [hereinafter *Counter Cyclical Income Payments*], <http://www.ers.usda.gov/Briefing/FarmPolicy/CounterCyclicalPay.htm>.

⁴⁴ USDA, Economic Research Service, Briefing Rooms, *Farm and Commodity Policy: Program Provisions, Direct Payments*, <http://www.ers.usda.gov/Briefing/FarmPolicy/DirectPayments.htm>. "Effective price" is the direct payment rate plus the larger of the national loan rate, which is set by the USDA on a county-by-county basis and the national average market price during that same year. USDA, Economic Research Service, Briefing Rooms, *Farm and Commodity Policy: Program Provisions*, <http://www.ers.usda.gov/Briefing/FarmPolicy/2002malp.htm>. It is interesting to note, however, that what policy makers deem a transition to market-based farming includes the effective equivalent of price supports in the form of counter-cyclical payments.

⁴⁵ *Counter Cyclical Income Payments*, *supra* note 43; see also USDA, Economic Research Service, *Farm Bill, Analysis of Selected Provisions, Counter-Cyclical Payments*, <http://www.ers.usda.gov/Features/Farmbill/analysis/counterCyclicalPayments2002act.htm>. The target price provided by the 2002 Farm Bill for cotton is \$0.724 per pound. *Id.* The formula for calculating both the historical payment rate as well as the

In addition to these payments, the USDA also provides an extensive system of marketing loans through the Commodity Credit Corporation (CCC).⁴⁶ First, the Marketing Loan Program allows producers to repay nonrecourse commodity loans at a lower rate whenever the world price or the loan repayment rate is lower than the farmer's contracted loan rate.⁴⁷ In exchange for the lower loan rate, the producer extends his expected crop as collateral to secure the loan.⁴⁸ Repayment rates for these loans are calculated on a county-by-county basis weekly, and the world price is also calculated every week.⁴⁹ Should a farmer repay the loan at a lower world or county repayment rate, the gain accrues to the farmer as a program benefit.⁵⁰

The separate Loan Deficiency Payment (LDP) program attempts to eliminate the refinancing aspects of the Marketing Loan Program, while allowing the producer all of the same gain.⁵¹ Instead of taking out a marketing loan, producers receive a payment in the amount of the difference between the loan rate and the current county or world price.⁵² In essence, these loans supplement the effect of the counter-cyclical payments to make farmers whole should commodity prices fall over the course of the farm year.

Commodity assistance is not limited to direct and counter-

counter-cyclical payment can be expressed as follows:

$$\text{Payment rate}_{\text{cotton}} = (\text{target price})_{\text{cotton}} - (\text{direct payment rate})_{\text{cotton}} - (\text{higher of commodity price or loan rate})_{\text{cotton}}$$

$$\text{CCP}_{\text{cotton}} = ([\text{Base acres}]_{\text{cotton}} \times 0.85) \times (\text{payment yield})_{\text{cotton}} \times (\text{payment rate})_{\text{cotton}}$$

Id.

⁴⁶ See, e.g., USDA, Economic Research Service, Farm Bill, *Marketing Assistance Loans and LDPs* [hereinafter *Marketing Assistance*], <http://www.ers.usda.gov/features/farbill/analysis/marketingLoan2002act.htm>.

⁴⁷ USDA, Economic Research Service, Farm Bill: Glossary, <http://www.ers.usda.gov/features/farbill/2002glossary.htm#mlp>.

⁴⁸ *Marketing Assistance*, *supra* note 46.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.* Like the direct and counter-cyclical payments, the loan repayment rate for marketing assistance payments and LDPs is defined by statute. For cotton, the loan repayment rate is \$0.52 per pound. *Id.*

cyclical payments. The USDA also sponsors a number of programs intended to finance exports of U.S. agricultural products.⁵³ These programs increase aggregate demand and offset tariffs applied to those commodities by importers.⁵⁴ Because the export subsidy offsets applied tariffs, as opposed to domestic subsidies, which are granted regardless of exports, developing countries view export subsidies to be of greater concern than the more diffused production subsidies.⁵⁵ As such, USDA's export programs, while not as well known to producers, are subject to much more strenuous regulation in the international arena.⁵⁶

The first group of USDA export subsidies is the Export Credit Guarantee Programs, also known as GSM-102 and GSM-103.⁵⁷ In general, these programs were created to "ensure that credit is available to finance commercial exports of U.S. agricultural products, while providing competitive credit terms to buyers."⁵⁸ To this end, the CCC guarantees payments due from foreign banks to exporters in the United States to facilitate the purchase of American agricultural products.⁵⁹ Generally, 98% of the principal and a portion of interest at an adjustable rate are covered through the program.⁶⁰ Because payment is guaranteed, financial institutions can offer competitive loan terms to the foreign banks, lowering the overall cost of export.⁶¹ Interested producers arrange the foreign sale, and then apply to the USDA's Foreign Agriculture Service (FAS) and CCC to qualify for the guarantee.⁶² As a direct result of the WTO's dispute resolution Appellate Body's decision in *United States—Subsidies on Upland Cotton*,

⁵³ MATSUSHITA ET AL., *supra* note 1, at 261.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ For a description of the treatment of various types of agricultural subsidies, see *infra* Section II.C.

⁵⁷ USDA, Foreign Agricultural Service, Fact Sheet *Export Credit Guarantee Programs (GSM-102)*, [hereinafter *Export Credit Programs*], <http://www.fas.usda.gov/info/factsheets/gsm102-03.asp>.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

which struck down parts of these programs,⁶³ the fees paid for these guarantees are no longer flat, and now require a risk-based premium to be paid depending on the creditworthiness of the importer, as well as the terms and length of the guarantee to be provided.⁶⁴ In addition, the Appellate Body Cotton Report led to the suspension of the GSM-103 Credit Guarantee Program, which extended flat risk guarantees in a similar fashion as GSM-102, but only for a much longer term, usually ranging from three to ten years.⁶⁵ These programs were available for nearly all agricultural commodities, including cotton.⁶⁶

Likewise, *United States—Subsidies on Upland Cotton* also altered the Supplier Credit Guarantee Program (SCGP).⁶⁷ The SCGP serves a similar purpose to both GSM-102 and GSM-103, except it offers its credit guarantees for a shorter duration (typically 180 days), and guarantees a much smaller percentage of the credit provided, usually only 65%.⁶⁸ Akin to GSM-102, the rate schedule for export financing under SCGP has been altered to better account for the relative risk of the importer, as well as to better quantify the overall program costs.⁶⁹

Finally, the 2002 Farm Bill created some special marketing provisions intended to keep domestically-produced cotton competitive on the global market.⁷⁰ Known as Step-1, Step-2, and Step-3, these provisions include an import quota for foreign-

⁶³ See generally Appellate Body Cotton Report, *supra* note 14.

⁶⁴ *Export Credit Programs*, *supra* note 57; Press Release, USDA Announces New On-Line System for U.S. Exporters and Banks (Aug. 25, 2005), http://www.fas.usda.gov/scripts/w/PressRelease/pressrel_dout.asp?Entry=valid&PrNum=0132-05.

⁶⁵ *Export Credit Programs*, *supra* note 57.

⁶⁶ *Id.*

⁶⁷ Press Release, USDA Announces Changes To Export Credit Guarantee Programs to Comply with WTO Findings, http://www.fas.usda.gov/scripts/w/PressRelease/pressrel_dout.asp?PrNum=0092-05

⁶⁸ USDA, Foreign Agricultural Service, Fact Sheet, *Supplier Credit Guarantee Program*, <http://www.fas.usda.gov/info/factsheets/scgp.asp>.

⁶⁹ *Id.*

⁷⁰ USDA, Economic Research Service, Briefing Rooms, *Farm and Commodity Policy: 1996-2001 Commodity Provisions* [hereinafter *Special Provisions*], <http://www.ers.usda.gov/Briefing/FarmPolicy/1996specialProvisions.htm>.

produced fiber.⁷¹ First, Step-1 allows for a further reduction of loan repayment rates under the marketing loan and LDP programs.⁷² These additional reductions are triggered when the adjusted world price (AWP) of cotton falls below 115% of the cotton loan rate, and the weekly average U.S.-Northern Europe (USNE) price exceeds the Northern Europe price quotation.⁷³ With its payment triggered by price indicators, this payment is another layer on top of the counter-cyclical payments and LDPs authorized for numerous other U.S. agricultural commodities.⁷⁴

Step-2 payments are made to exporters and domestic mills to subsidize their purchases of higher priced U.S. cotton.⁷⁵ Under the 2002 Farm Bill, the Step-2 payment rate for the 2002-2005 marketing years is calculated as the difference between the price of U.S. cotton delivered in Northern Europe and the average of the five lowest prices of cotton delivered in Northern Europe from any source, which would likely cover U.S. cotton as well.⁷⁶ In its pleadings before the Appellate Body, the U.S. maintained that Step-2 payments were part of its domestic support program as they were targeted to domestic cotton users as well as exporters.⁷⁷

Finally, the Step-3 program imposes a periodic quota on imports as follows:

Step-3 authorizes the President to announce a special quota for upland cotton, if for any consecutive 4-week period, the weekly average U.S.-Northern Europe price quotation (adjusted for any certificate value in effect, unless U.S. supplies are extremely tight) exceeds the Northern Europe price quotation by more than 1.25 cents per pound (the 1.25-cent threshold is delayed until August 1, 2006).⁷⁸

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ See *supra* text accompanying notes 40-50.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ Appellant's Submission of the United States, *United States—Subsidies on Upland Cotton*, WT/DS 267/AB/R (Oct. 28, 2004) ¶¶ 427-30, available at http://www.ustr.gov/assets/Trade_Agreements/Monitoring_Enforcement/Dispute_Settlement/WTO/Dispute_Settlement_Listings/asset_upload_file938_5598.pdf.

⁷⁸ *Special Provisions*, *supra* note 70.

In total, the quota is limited to a total of five weeks' of domestic consumption in order to temporarily lower domestic price.⁷⁹ Additionally, another small quota provision is triggered by further domestic market disruption, involving a lower threshold of price decline over a longer period of time.⁸⁰ Counter intuitively, these quota provisions worked to reduce domestic price (through additional foreign imports) in order to make American cotton more competitive on the global market.⁸¹

In summary, USDA cotton programs provide various advantages for domestic producers. Direct payments are fixed and decoupled from both price and current production.⁸² Counter-cyclical payments are not linked to production, but are triggered by target prices that are defined by statute.⁸³ Marketing loans and LDPs, as well as the Step-1 and Step-2 programs, are coupled to production as well as market price.⁸⁴ Export finance programs, such as GSM-102, GSM-103, and SCGP have been pared down in recent months, but still provide credit guarantees and facilitate export of U.S. commodities.⁸⁵ Finally, the Step-3 program provides for limited periodic import quotas triggered by price in order to maintain the stability of U.S. cotton stocks by regulating their price to world levels.⁸⁶ Together, these programs create a comprehensive safety net for domestic producers that rarely fails to account for any fluctuation in price, weather-related hardship, or shift in global politics.

⁷⁹ *Id.*

⁸⁰ *Id.* This program is known as the limited global import quota. *Id.*

⁸¹ *Id.*

⁸² Paul C. Westcott and Leslie A. Meyer, U.S. Cotton Supply Response Under the 2002 Farm Act (Feb. 21, 2003) Agricultural Outlook Forum 2003, available at http://agecon.lib.umn.edu/cgi-bin/pdf_view.pl?paperid=13353&ftype=.pdf.

⁸³ *Id.*

⁸⁴ *Id.*; see also *Special Provisions*, *supra* note 70.

⁸⁵ *Export Credit Programs*, *supra* note 57; Press Release, USDA Announces Changes, *supra* note 67; *Supplier Credit Guarantee Program*, *supra* note 68.

⁸⁶ *Special Provisions*, *supra* note 70.

C. WTO Framework for Agriculture and Subsidies and Countervailing Measures

Much of the discussion surrounding the current Doha Round⁸⁷ involves the classification of agricultural subsidies and countervailing measures into different categories, known as "boxes."⁸⁸ This section will first examine the WTO agreements that provide a framework for domestic and export supports, and then classify the various commodity programs previously discussed in II.B into the boxes.

One of the key documents relating to the current cotton dispute is the WTO Agreement on Agriculture, which was approved as part of the creation of the WTO in 1995.⁸⁹ The Preamble of this Agreement sets out the lofty "long-term objective" to "provide for substantial progressive reductions in agricultural support and protection sustained over an agreed period of time, resulting in correcting and preventing restrictions and distortions in world agricultural markets."⁹⁰ The Agreement then isolates several basic areas of obligation for its signatory nations: market access, domestic support, export subsidies, and safeguards.⁹¹

First, under the market access provisions of the Agriculture Agreement, Article 4, countries agree to convert their existing framework of quotas and non-tariff barriers into tariffs that could then be subject to percentage-based cuts in the future.⁹² With the move to tariffs, each country will be committed to incorporating agricultural support into its Schedule of Concessions, which is

⁸⁷ See generally The Doha Declaration Explained, http://www.wto.org/english/tratop_e/dda_e/dohaexplained_e.htm. "The Doha Round" is the vernacular for the current round of multilateral trade negotiations currently progressing through the WTO, and took its name from the WTO ministerial meeting from which the new talks were launched. *Id.* In general, the phrase "the Doha Round" is used to describe the effort to negotiate a comprehensive agreement to augment and replace the framework achieved in the formative 1994 Agreement, which was known as the "Uruguay Round." *Id.*

⁸⁸ MATSUSHITA ET AL., *supra* note 1, at 137 n.158.

⁸⁹ Agreement on Agriculture, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Multilateral Agreement on Trade in Goods, available at http://www.wto.org/english/docs_e/legal_e/14-ag.pdf [hereinafter Agriculture Agreement].

⁹⁰ Agriculture Agreement, *supra* note 89, pmbl.

⁹¹ *Id.*

⁹² *Id.*, art. 4; see also MATSUSHITA ET AL., *supra* note 1, at 136.

subject to wholesale cuts under the existing GATT and WTO framework.⁹³ The Agreement also provides for so-called “tariff quotas,” which provide lower tariff rates for lower amounts of imports that rapidly climb as imports of that product increase.⁹⁴ In general, the goal of this section is to allow for more transparency to facilitate further cuts in the future while maintaining a semblance of transitional protection over the short term.⁹⁵

Next, under the Agriculture Agreement, developed countries agreed to reduce their “aggregate measurement of support” (AMS) by 20% over a five-year phase-in period that ended in 2001.⁹⁶ In return, developing countries agreed to reduce their AMS by 13.3% by the beginning of 2005, and least-developed countries were required to make no concessions at all.⁹⁷ Interestingly, the Agriculture Agreement, as well as the entire WTO Agreement, does not provide any formal definition or criteria for differentiating between “developing” and “developed” countries, resulting in what one commentator deems “self-selection” by the interested parties.⁹⁸ However, Article XI of the WTO Agreement does provide some definition for “least developed” countries, borrowing a definition from the UN Committee for Development Planning.⁹⁹

In addition, the Agreement differentiates between varieties of domestic support, splitting them into various “boxes.”¹⁰⁰ Under

⁹³ MATSUSHITA ET AL., *supra* note 1, at 136.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.* See generally Agriculture Agreement, *supra* note 89, arts. 1 & 7 (defining AMS).

⁹⁷ Agriculture Agreement, *supra* note 89, arts. 15 & 16; see also MATSUSHITA ET AL., *supra* note 1, at 136.

⁹⁸ MATSUSHITA ET AL., *supra* note 1, at 374.

⁹⁹ Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, art. XI.2, Original Membership (1994), available at http://www.wto.org/english/docs_e/legal_e/04-wto.pdf [hereinafter WTO Agreement]; MATSUSHITA ET AL., *supra* note 1, at 374. This determination is based on four criteria: “per capita income, population size, quality of life index and economic diversification.” MATSUSHITA ET AL., *supra* note 1, at 374 (citing UNESCOR, 29th Sess. Supp. No. 2, at 64, 67, U.N. Doc. E/1994/22 (1994)).

¹⁰⁰ Agriculture Agreement, *supra* note 89, art. 6, annex 2; MATSUSHITA ET AL., *supra* note 1, at 137.

Article 6 of the Agriculture Agreement, exempt subsidies are split into two categories: "green box" and "blue box" subsidies.¹⁰¹ "Green box" subsidies include domestic food aid, direct payments to producers, decoupled income support, research, environmental programs, extension, training, advisory services, and crop insurance.¹⁰² "Blue box" subsidies include specially permitted subsidies for developing countries, "de minimis" subsidies that are roughly 5-10% of the annual value of the commodity produced, and other subsidies for developing countries specifically designed to limit agricultural production.¹⁰³ In contrast to exempt subsidies, which have no effect on trade, "amber box" subsidies are those limited by Article 6 because they distort trade or production.¹⁰⁴ These payments include "measures to support prices, or subsidies directly related to production quantities"¹⁰⁵ and they are subject to limits, "as 'de minimis' supports are allowed (5% of agricultural production for developed countries, 10% for developing countries)."¹⁰⁶ By agreement, "the 30 WTO members that had larger subsidies than the de minimis levels at the beginning of the post-Uruguay Round reform period are committed to reduce these subsidies."¹⁰⁷ These commitments to reduce amber box subsidies are made in terms of percentage reductions of "Total AMS" over a specified period of time, which includes all support for individual products combined with general commodity-generic supports.¹⁰⁸

In many ways, compliance with WTO commitments is self-enforcing. As part of the 1994 Agreement, twenty-eight countries agreed to set ceilings on AMS and to reduce payments by 20% by 2000, with calculation of AMS to be completed by the individual

¹⁰¹ *Id.*

¹⁰² Agriculture Agreement, *supra* note 89, annex 2; USDA, Economic Research Service, *Aligning U.S. Farm Policy with World Trade Commitments* AGRICULTURAL OUTLOOK, Jan.-Feb. 2002, at 12 [hereinafter U.S. Farm Policy], available at <http://www.ers.usda.gov/publications/AgOutlook/Jan2002/ao288d.pdf>.

¹⁰³ Agriculture Agreement, *supra* note 89, art. 6; MATSUSHITA ET AL., *supra* note 1, at 137 n.158.

¹⁰⁴ WTO, Agriculture Background, *Domestic Support in Agriculture, The Boxes*, http://www.wto.org/english/tratop_e/agric_e/agboxes_e.htm (last visited Mar. 5, 2007).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

countries.¹⁰⁹ Total domestic AMS is calculated by adding together all of the payments that fall into the green, blue, and amber boxes, after first subtracting domestic food aid, government expenditures for research and inspection, as well as exempt blue, green, and de minimis payments.¹¹⁰ United States AMS equaled roughly half of the allowed amount in 1998; however, the United States provided nearly 80% of its permitted ceiling through additional payments to producers in 1999 and 2000.¹¹¹ From a global view, even before the 2002 Farm Bill, the United States provided a higher level of economic support for its producers than any other country in the world, with support equaling 23% of total agricultural production.¹¹² In order to comply with WTO commitments, the 2002 Farm Bill, which increased annual spending on agriculture by roughly \$5 billion annually,¹¹³ provides for a “circuit breaker,” which requires the U.S. Secretary of Agriculture to modify or restrict commodity payments to avoid exceeding the WTO domestic payment ceilings.¹¹⁴ As a matter of comparison, the United States’ ceiling for targeted AMS is one quarter of that provided by the European Union.¹¹⁵

In addition to curtailing domestic supports, the Agreement also reduces export subsidies.¹¹⁶ Under this section, export subsidies are reduced in value by 36%, and 21% in volume for developed countries; for developing countries, export subsidies are reduced

¹⁰⁹ Fredrick J. Nelson, *Aligning U.S. Farm Policy with World Trade Commitments*, AGRICULTURAL OUTLOOK, Jan.-Feb. 2002, at 12.

¹¹⁰ *Id.* at 13.

¹¹¹ *Id.*

¹¹² STEVEN ZAHNISER, ED YOUNG & JOHN WAINIO, RECENT AGRICULTURAL POLICY REFORMS IN NORTH AMERICA 2-3 (2005), <http://www.ers.usda.gov/publications/WRS0503/wrs0503.pdf>.

¹¹³ Press Release, House Comm. on Agric., Farm Security and Rural Investment: President Praises Legislation, Awaits Senate to Concur (May 2, 2002), *available at* <http://agriculture.house.gov/press/107/pr020502.html>.

¹¹⁴ ZAHNISER ET AL., *supra* note 112, at 8.

¹¹⁵ USDA Domestic Support Today, <http://www.fas.usda.gov/itp/wto/hongkong/domesticsupport.pdf> (last visited Mar. 6, 2007). At present, the United States’ ceiling for AMS is \$19 billion, with the European Union capping its AMS at \$88 billion annually. *Id.*

¹¹⁶ Agriculture Agreement, *supra* note 89, art. 1(e), Art. 9(2)(b)(iv); MATSUSHITA ET AL., *supra* note 1, at 137.

by 24% and 14%, respectively.¹¹⁷ Additional phase-outs have been proposed for the next phase of liberalization, along with a broadening of the definition of export subsidies to include food aid and export credit¹¹⁸

As defined in Part II.B, the commodity payments for cotton are included in the estimate of AMS. Specifically, direct commodity payments are green box payments, as they are not coupled with price or acreage.¹¹⁹ In contrast, because they are both linked to price, counter-cyclical payments as well as Marketing Assistance Loans and LDPs fall into the trade-distorting and limited "amber box."¹²⁰ Because the United States does not make payments intended to restrict supply, it has no programs that fall into the "blue box."¹²¹

These classifications are essential to analysis of *United States—Subsidies on Upland Cotton*, for the key to the dispute lies in conflicting estimates and definitions of these payments—are U.S. payments and subsidies for cotton really in excess of its category-by-category caps? Because these commitments were imposed on a voluntary basis by all the countries, and compliance with these commitments is largely self-reported, the question remains how a nation that believes another is reneging on its commitments can prove these accusations and obtain a remedy.

D. Subsidies and Counter-Measures Agreement (SCM)

An additional layer of regulation of subsidies and other trade distorting payments and programs is embodied in the Subsidies and Countervailing Measures Agreement (SCM), which, like the Agreement on Agriculture, was appended to the 1994 WTO foundational agreement.¹²² It is difficult to make general

¹¹⁷ Agriculture Agreement, *supra* note 89, art. 9(2)(b)(iv).

¹¹⁸ WTO, *Agriculture Negotiations Background, Export Subsidies and Competition*, http://www.wto.org/english/tratop_e/agric_e/negs_bkgnd08_export_e.htm (last visited Mar. 6, 2007).

¹¹⁹ Nelson, *supra* note 109, at 13; *see also Upland Cotton: Summary of 2002 Commodity Loan and Payment System*, *supra* note 36.

¹²⁰ Nelson, *supra* note 109, at 14. Note as well that the calculation of amber box payments is central to ongoing compliance actions in the wake of *United States—Subsidies on Upland Cotton*.

¹²¹ *Id.* at 12.

¹²² Agreement of Subsidies and Countervailing Measures, Apr. 15, 2004, Marrakesh

statements regarding the nature of subsidies, but two statements are generally true—the merit of the subsidy largely depends on its context, and in terms of the WTO, context is largely left to the eye of the beholder.¹²³ As such, the SCM was intended to define subsidies, regulate their use, and prescribe potential policy responses for nations adversely affected by the subsidies of other nations.¹²⁴ The agreement focuses on subsidies, which can be broadly defined as a “benefit that is not earned,”¹²⁵ and countervailing duties, which are “dut[ies] imposed [on imports] to offset the advantage to foreign producers derived from a subsidy that their government offers for the production or export of the article taxed.”¹²⁶

Based on these principles, Part I of the SCM provides a more elaborate definition of subsidies, and introduces the concept of “specificity,” which is designed to determine “whether the subsidy is available only to an enterprise or industry or group of enterprises or industries.”¹²⁷ In addition, Parts III, IV, and V of the SCM establish three categories of subsidies—prohibited or “red light” subsidies, actionable or “amber light” subsidies, and non-actionable or “green light” subsidies.¹²⁸ For prohibited and actionable subsidies, the SCM provides remedies for adversely affected parties.¹²⁹ In the case of the more difficult to define actionable subsidies, the SCM requires a finding of “serious prejudice” before any remedy is permitted.¹³⁰

Under Article 3.1, the SCM Agreement exempts most

Agreement Establishing the World Trade Organization, Annex 1A (1994), available at http://www.wto.org/english/docs_e/legal_e/24-scm_01_e.htm [hereinafter SCM].

¹²³ See generally MATSUSHITA ET AL., *supra* note 1, at 260-63.

¹²⁴ *Id.* at 262-63.

¹²⁵ *Id.* at 260.

¹²⁶ *Id.* at 262 (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1993)).

¹²⁷ SCM, *supra* note 122, arts. 1, 2.1; MATSUSHITA ET AL., *supra* note 1, at 264.

¹²⁸ SCM, *supra* note 122, arts. 3-8; MATSUSHITA ET AL., *supra* note 1, at 264. This same framework of color-coded categories of payments that is reflected in the green, amber, and blue “boxes” of the Agriculture Agreement. *Id.*

¹²⁹ SCM, *supra* note 122, art. 4, 7.

¹³⁰ SCM, *supra* note 122, art. 6. This Article of the SCM provides some objective standards as to what constitutes “serious prejudice,” but the provisions are broadly drafted giving a potential complainant or dispute resolution panel plenty of flexibility. *Id.*

agricultural subsidies, intending to allow for the regulation of the sensitive issue of agricultural subsidies to the Agreement on Agriculture.¹³¹ The Agreement on Agriculture contains what is referred to as the “peace clause,” which encourages the “due restraint” of members from pursuing formal dispute settlement proceedings if the offending nations’ agricultural subsidies are consistent with the Agreement on Agriculture.¹³² The “peace clause,” however, expired at the end of 2004 and complaining nations have used this to prosecute possible violations of the Agriculture Agreement in the dispute resolution process described in Part III.A.¹³³

In summary, the SCM Agreement categorizes three types of subsidies—prohibited, actionable, and non-actionable—whose definitions largely mirror those in the Agriculture Agreement.¹³⁴ These labels are used across sectors and across agreements within the larger WTO Agreement.¹³⁵ However, because of the “peace clause,” the specific terms of what is “prohibited” or “actionable” depends, in the case of agricultural subsidies, on the specific terms of the Agriculture Agreement.¹³⁶ As such, the failure of the Doha Round to produce new market reforms for agriculture, and the subsequent lapsing of the “peace clause,” have resulted in the use of the SCM Agreement to prosecute possible violations of the Agriculture Agreement through the Dispute Settlement Board (DSB) process described later in this Comment.¹³⁷

As a result, the Appellate Body considering *United States—Subsidies on Upland Cotton* was forced to consider whether U.S. subsidies violated not only the specifics of the Agriculture Agreement, but also whether these violations resulted in “serious

¹³¹ SCM, *supra* note 122, art. 3.1.

¹³² Agriculture Agreement, *supra* note 89, art. 13; MATSUSHITA ET AL., *supra* note 1, at 265.

¹³³ *Id.*

¹³⁴ See *supra* notes 124 & 126 and accompanying text.

¹³⁵ *Id.*

¹³⁶ Agriculture Agreement, *supra* note 89, art. 13; MATSUSHITA ET AL., *supra* note 1, at 265.

¹³⁷ Agriculture Agreement, *supra* note 89, art. 13; MATSUSHITA ET AL., *supra* note 1, at 265

prejudice” as required under the SCM.¹³⁸ It is unclear whether future DSB proceedings on agricultural matters will have to consider the dispute under both the Agriculture Agreement and the SCM, or whether the application of one agreement over another would make a material difference in future cases. Regardless, the failure to reach a substantive agreement through the Doha Round has added further complication to the already difficult process of administering the current WTO subsidy regime.

III. WTO Dispute Settlement Process and Procedure

A. Background

One of the defining characteristics of the WTO is its emphasis on multilateral agreements based on consensus.¹³⁹ The WTO Agreement provides that “[t]he body concerned shall be deemed to have decided by consensus . . . if no Member, present at the meeting when the decision is taken, formally objects to the proposed decision.”¹⁴⁰ If the matter cannot be decided through consensus, Article IX also allows for voting in certain circumstances.¹⁴¹ For instance, accession of a new member to the WTO requires a two-thirds majority.¹⁴² However, because of the politics and grouping of countries with similar interests at the WTO, accession, like nearly all other matters, is effectively accomplished by way of consensus since voting often occurs through blocs.¹⁴³ Likewise, permissive interpretations of WTO Agreements (as opposed to strict determinations) can only be adopted by a three-fourths vote, effectively limiting the reach of the agreements to the four corners of the approved document.¹⁴⁴

As a result of these restrictions placed upon the governing body, the WTO operates almost exclusively on the basis of

¹³⁸ See Appellate Body Cotton Report, *supra* note 14.

¹³⁹ WTO Agreement, *supra* note 99, art. IX:1.

¹⁴⁰ *Id.* art. IX n.1.

¹⁴¹ *Id.* art. IX:1.

¹⁴² *Id.* arts. XII:1 - 2.

¹⁴³ AMRITA NARLIKAR, INTERNATIONAL TRADE AND DEVELOPING COUNTRIES: BARGAINING COALITIONS IN THE GATT & WTO 34-39 (2003).

¹⁴⁴ MATSUSHITA ET AL., *supra* note 1, at 12.

treaty.¹⁴⁵ The dispute resolution process, however, mixes both custom and binding arbitration in sharp contrast to the consensus-minded negotiating body.¹⁴⁶ Created by the WTO Agreement, the WTO dispute resolution arm shares many similarities with a court of international law: “there is compulsory jurisdiction, disputes are settled largely by applying rules of law, decisions are binding on the parties and sanctions may be imposed if decisions are not observed.”¹⁴⁷ With more than eighty cases filed in the first two years after its creation, and over 350 cases filed by late 2005, one commentator indicates that “[t]his activity implies confidence in the system and places political pressure on all states to comply, because many, including the most important trading nations, are both complainants and respondents in the various trade disputes considered.”¹⁴⁸ In fact, the WTO itself likens the increase in dispute resolution claims to a “growing faith in the system,” and the fact that it is more effective to resolve disputes through this process as opposed to “taking the law into their own hands.”¹⁴⁹

The current framework for the resolution of disputes was codified in the 1995 WTO Agreement, through a connected “Understanding on Rules and Procedures Governing the Settlement of Disputes.”¹⁵⁰ This agreement replaced the previous framework imposed under the GATT of 1947.¹⁵¹ Article XXIII of the GATT created a process for resolving “nullification or impairment” of the GATT, which occurred in three possible ways: “(a) the failure of another contracting party to carry out its obligations under this agreement, or (b) the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement, or (c) the existence of any other situation.”¹⁵² The GATT 1947 provided for a three-tier system of

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 64.

¹⁴⁷ *Id.* at 18.

¹⁴⁸ *Id.* at 18; *see also* Disputes by Country, *supra* note 9.

¹⁴⁹ WTO, *Understanding the WTO: Settling Disputes: A Unique Contribution*, http://www.wto.org/english/thewto_e/whatis_e/tif_e/displ_e.htm (last visited Mar. 6, 2007) [hereinafter *Settling Disputes*].

¹⁵⁰ *See* DSU, *supra* note 7.

¹⁵¹ *Settling Disputes*, *supra* note 149.

¹⁵² WTO, General Agreement on Tariffs and Trade, Oct. 30, 1947, art. XXIII:1(a)-

resolution based on escalation, beginning with an open letter from the concerned party describing the areas of concern and potential remedies to the other contracting party or parties which must be given “sympathetic consideration.”¹⁵³ Should this action prove inadequate, the matter is referred to the general body of “Contracting Parties,” which “shall promptly investigate any matter so referred to them and shall make appropriate recommendations to the contracting parties which they consider to be concerned, or give a ruling on the matter, as appropriate.”¹⁵⁴ As part of this process, the Contracting Parties can consult with individual parties to the GATT or consult with other international organizations, including the United Nations.¹⁵⁵

If the Contracting Parties’ recommendations are not accepted, or the dispute persists, the general body may then allow one of the parties to suspend application of the Agreement towards the offending party as a means of affecting a retaliatory countermeasure.¹⁵⁶ The offending party then has an option to withdraw from the GATT upon sixty days’ notice.¹⁵⁷ Because of its success, the GATT dispute resolution process became formalized over time, adding layers over the minimalist provisions of Article XXIII.¹⁵⁸ In many ways, the very nature of the GATT is what held its dispute resolution process together—ignoring a decision by the dispute resolution process would consequently diminish the overall legal framework that underpinned the GATT.¹⁵⁹ As a result, the Contracting Parties have permitted the suspension of concessions only once throughout the nearly 50 years of the GATT.¹⁶⁰

(c), available at http://www.wto.org/english/docs_e/legal_e/gatt47_02_e.htm [hereinafter GATT 1947]; see also MATSUSHITA ET AL., *supra* note 1, at 19.

¹⁵³ GATT 1947, *supra* note 152, art. XXII:1.

¹⁵⁴ *Id.* art. XXIII:2.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ See MATSUSHITA ET AL., *supra* note 1, at 20 (describing at length the multiple supplemental dispute resolution agreements entered into under GATT 1947).

¹⁵⁹ *Id.* at 20-21.

¹⁶⁰ *Id.* Ironically, the sanctions were authorized against the United States in 1952 for restrictions on dairy imports, one of the few U.S. agricultural products subject to more government control and subsidization than cotton. *Id.*

Although members respected the GATT process, it was not without problems. In many ways, these problems were just as attributable to the nature of the underlying agreement as its successes.¹⁶¹ The process was slow and panels often encountered obstacles due to the high vote requirements required for panel formation and recommendation acceptance.¹⁶² In addition, because of the high bar needed to secure acceptance of the panel recommendations, the recommendations were largely ad hoc, rather than based on consistent precedent, leading to a process that was often far from predictable.¹⁶³

When framing the dispute resolution process for the new WTO, the negotiating parties desired to adopt a system that would resolve the obstacles posed by the more consensus-oriented GATT process, but also keep Contracting Parties from either ignoring the mandated resolution or leaving the WTO altogether.¹⁶⁴ The WTO's foundational agreement states that "[e]xcept as otherwise provided under this Agreement or the Multilateral Trade Agreements, the WTO shall be guided by the decisions, procedures and customary practices followed by the CONTRACTING PARTIES to GATT 1947 and the bodies established in the framework of GATT 1947."¹⁶⁵ The current dispute resolution process should be viewed not as a re-writing of the GATT's procedure, but rather as a fleshing out of the skeletal process first articulated through the 1947 Agreement.¹⁶⁶

As created by the Dispute Settlement Understanding (DSU), the current dispute settlement system consists of three major bodies: the Dispute Settlement Body (DSB), dispute panels, and the Appellate Body.¹⁶⁷ The DSB has "the authority to establish

¹⁶¹ *Id.* at 21.

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ See MATSUSHITA ET AL., *supra* note 1, at 22; see also *Settling Disputes*, *supra* note 149.

¹⁶⁵ WTO Agreement, *supra* note 99, art. XVI:1.

¹⁶⁶ In many ways, the WTO Agreement and its attached DSU can be viewed as a consolidation and extension of a series of agreements; for example, provisions of the Agreement on Subsidies and Countervailing Measures compliment the DSU. See SCM, *supra* note 122.

¹⁶⁷ DSU, *supra* note 7, art. 2.1.

panels, adopt panel and Appellate Body reports, maintain surveillance of implementation of rulings and recommendations, and authorize suspension of concessions and other obligations under the covered agreements.”¹⁶⁸ The DSB covers most of the agreements attached to the WTO Agreement including the Agreement on Agriculture.¹⁶⁹ Underneath this umbrella organization are the panels themselves, which are composed of “well-qualified governmental and/or non-governmental individuals” who are generally trade experts with some governmental or academic experience.¹⁷⁰ Initial panels are usually composed of three members, but can include five panelists upon mutual agreement of the parties.¹⁷¹

In addition to the DSB and individual panels, the DSU also creates an appellate body to review panel rulings.¹⁷² The Appellate Body is composed of seven individuals appointed to four-year terms by the DSB.¹⁷³ Though only three members sit on a review panel for any one case, all seven must make themselves relatively familiar with all of the cases before the DSB.¹⁷⁴ Like members of the initial panels, Appellate Body members are required to have significant experience in the field of international trade and must not be affiliated with any particular government.¹⁷⁵

The DSU also provides a more binding procedure for evaluating the disputes themselves with agreed upon timeframes for each phase.¹⁷⁶ Though all members of the WTO have agreed to be bound by the DSU, the agreement states that a “[m]ember shall exercise its judgment as to whether action in these procedures would be fruitful.”¹⁷⁷ Instead, the DSU indicates that the formal complaint initiating the dispute resolution process is a

¹⁶⁸ *Id.* art. 2.1.

¹⁶⁹ *Id.* art. 1(A).

¹⁷⁰ *Id.* art. 8.1.

¹⁷¹ *Id.* art. 8.5.

¹⁷² *Id.* arts. 17.1 - 17.2

¹⁷³ DSU, *supra* note 7, arts. 17.1 - 17.2.

¹⁷⁴ *Id.* art. 17.1.

¹⁷⁵ *Id.* art. 17.3.

¹⁷⁶ *Settling Disputes*, *supra* note 149.

¹⁷⁷ DSU, *supra* note 7, art. 3.7.

“last resort” that may only be exercised should consultation with the offending parties bear no fruit.¹⁷⁸ If the complaining party initiates formal proceedings, the other concerned party or parties must reply to the notification within 10 days and must “enter into consultations in good faith” within the next 30 days.¹⁷⁹ Only if the formal consultations¹⁸⁰ fail to produce a settlement of the dispute within 60 days can the parties push forward with the panel process.¹⁸¹

Once the consultation period has expired, the complaining party can request the formation of a panel by the DSB.¹⁸² While the responding party may be able to block the formation of the panel initially, the panel must be established at the next DSB unless there is a unanimous vote against the creation.¹⁸³ This last provision is a critical addition to the new DSU that addresses the difficulty many countries faced when they attempted to move a dispute into a more formal resolution process under the GATT 1947 procedures.¹⁸⁴ While the panel process is a formal arbitration proceeding, it is still flexible enough to allow for the resolution of related disputes.¹⁸⁵ For example, a single panel can consider multiple complaints of the same type against the same offending party or parties, as well as the concerns of related third parties that might be affected by either the dispute or its resolution.¹⁸⁶

During the panel process itself, the complaining party has the burden of proof to demonstrate the offending nation's lack of compliance with its particular WTO commitments.¹⁸⁷ For

¹⁷⁸ *Id.* art. 3.7.

¹⁷⁹ *Id.* art. 4.3.

¹⁸⁰ *Settling Disputes*, *supra* note 149. These formal consultations can involve formal mediation from the WTO director-general. *Id.*

¹⁸¹ DSU, *supra* note 7, art. 4.7.

¹⁸² *Id.* arts. 4.7 - 4.8.

¹⁸³ *Id.* art. 6.1; *see also Settling Disputes*, *supra* note 149.

¹⁸⁴ *Cf.* MATSUSHITA ET AL., *supra* note 1, at 21 (describing the procedural obstacles to instituting the formal dispute resolution process under the GATT 1947).

¹⁸⁵ MATSUSHITA ET AL., *supra* note 1, at 28.

¹⁸⁶ DSU, *supra* note 7, arts. 9.1, 10.2; *see also* MATSUSHITA ET AL., *supra* note 1, at 28.

¹⁸⁷ MATSUSHITA ET AL., *supra* note 1, at 38 (citing *U* the formal dispute resolution process under the GATT 1947).

example, the panel in *United States—Shirts and Blouses* held that when the complaining nation establishes that the offending party has violated the agreement, the offending nation then has the burden of proving that the “challenging party[‘s] [claim] is not based on an appropriate ground.”¹⁸⁸ In short, the “party which makes an affirmative claim, whether it is the complaining party or the defending party, bears the burden of proof.”¹⁸⁹

This is not to say, however, that the dispute panel’s process is entirely equivalent to familiar notions of judicial process in the United States. Instead, the panel is merely a device to help the DSB come to agreement about its binding action. Under the DSU, the function of the panel is “to assist the DSB in discharging its responsibilities under this understanding and the covered agreements.”¹⁹⁰ But, just as the DSU requires consensus to block the formation of a panel, it also requires a consensus of the DSB to block adoption of the panel’s findings within 60 days of circulation to member countries.¹⁹¹ Any party (excluding appurtenant third parties) to a dispute can appeal the panel’s report to the Appellate Body.¹⁹²

Like appellate proceedings in the United States, the Appellate Body’s ruling is “limited to issues of law covered in the panel report and legal interpretations developed by the panel.”¹⁹³ The Appellate Body need not exercise strict judicial economy—the DSU states that the Appellate Body must “address each of the issues raised in accordance with paragraph 6 during the appellate proceeding.”¹⁹⁴ The Appellate Body can “uphold, modify, or

¹⁸⁷ MATSUSHITA ET AL., *supra* note 1, at 28.

¹⁸⁷ DSU, *supra* note 7, art. 9.1, 10.2; *see also* MATSUSHITA ET AL., *supra* note 1, at 28.

¹⁸⁸ Report of the Appellate Body, *United States—Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, ¶ 38, WT/DS33/AB/R (Apr. 25, 1997) [hereinafter *United States—Shirts and Blouses*].

¹⁸⁹ *Id.* ¶ 39.

¹⁹⁰ DSU, *supra* note 7, art. 11.

¹⁹¹ *Id.* art. 16.4.; *see also* *Settling Disputes*, *supra* note 149. This too is a substantial change reflecting efforts to improve the dispute resolution system from the foundations of the GATT 1947. *Id.*

¹⁹² DSU, *supra* note 7, art. 17.4.

¹⁹³ *Id.* art. 17.6.

¹⁹⁴ *Id.* art. 17.12.

reverse”¹⁹⁵ the panel’s recommendation within 60 to 90 days of the appeal¹⁹⁶ provided its ruling addresses every legal issue raised in the proceeding, regardless of whether it is relevant to the dispute.¹⁹⁷ It bases its decision on an “objective assessment” of the facts before it,¹⁹⁸ but is allowed substantial deference to conduct its own fact-finding and investigation.¹⁹⁹ In some ways, while the Appellate Body is limited to issues of law, rather than of fact,²⁰⁰ its decision takes on aspects of a *de novo* proceeding as well.²⁰¹ Once the Appellate Body has made its recommendation, the DSB and the involved parties must accept the report within 30 days unless there is a consensus vote to reject the recommendation.²⁰²

Following the exhaustion of the formal resolution process and the adoption of the Appellate Body’s recommendation by the DSB, the focus of the process turns to correcting the breach of the Agreement— “[t]he priority at this stage is for the losing ‘defendant’ to bring its policy into line with the ruling or recommendations.”²⁰³ Within 30 days of the adoption of the panel or Appellate Body’s report by the DSB, the offending party must make its intentions known to the DSB as to whether it plans to comply with the ruling.²⁰⁴ Should it be impracticable for the offending party to adjust its policies to comply with the DSB ruling, the Member will have a “reasonable” amount of time in which to make the necessary adjustments.²⁰⁵

¹⁹⁵ *Id.* art. 17.3.

¹⁹⁶ *Id.* art. 17.5

¹⁹⁷ *Id.* art. 17.12.

¹⁹⁸ DSU, *supra* note 7, art. 11.

¹⁹⁹ *Id.* art. 13.

²⁰⁰ *Id.* art. 17.6.

²⁰¹ *Id.* art. 17.13.

²⁰² *Id.* art. 17.14. (allowing members to express their views in the report, perhaps as a type of “dissenting opinion.”).

²⁰³ *Settling Disputes*, *supra* note 149.

²⁰⁴ *Id.* art. 21.3.

²⁰⁵ *Id.* art. 21.3. Per this Article of the Agreement, “reasonable” is defined in three ways: a) the period of time proposed by the offending party; b) a period of time mutually agreed to by the parties within 45 days of the decision of the DSB; or c) a period of time decided by binding arbitration before the panel. *Id.* In the present cotton dispute, decided in March 2005, the United States is still awaiting Congressional action to make statutory changes to affect the appropriate remedy. See discussion *infra* Part

Though the DSU provides a stronger and more regimented basis for resolving disputes, some argue that the DSU's enforcement of DSB rulings is less than rigorous. Because there is little guidance to the losing party as to specific actions needed to effect compliance with the ruling, the losing party often "take[s] minimal steps and declare[s] itself in full compliance."²⁰⁶ If the complaining party disagrees, or if the losing party fails to meet the expectations of the complaining party with regards to its response, what has really been gained through the added formalism of the dispute process? The WTO has partially addressed this problem by referring the matter to a compliance panel created under the DSU.²⁰⁷ Also, the DSU permits the complaining party to request permission from the DSB to retaliate against the offending party within 20 days of the expiration of the "reasonable" period provided under Article 21.3.²⁰⁸

In addition, the DSB can specify sanctions against the offending party in its own stead.²⁰⁹ The two options available are compensation and retaliation.²¹⁰ Compensation requires the offending nation to compensate the complaining nation, usually in the form of additional trade concessions which are of equivalent value to those initially mandated as part of the DSB's settlement ruling.²¹¹ The DSB also can authorize the complaining nation to retaliate against the offending nation through a suspension of concessions against the offending party.²¹² Retaliation measures authorized by the DSB remain under the supervision of the DSB at all times.²¹³ The goal of such measures is to force the offending

IV.C.

²⁰⁶ MATSUSHITA ET AL., *supra* note 1, at 30.

²⁰⁷ *Id.* at 30-31; *see also* DSU, *supra* note 7, art. 21.5.

²⁰⁸ DSU, *supra* note 7, art. 22.2.

²⁰⁹ *Id.* art. 22; *see also* MATSUSHITA ET AL., *supra* note 1, at 32; *Settling Disputes*, *supra* note 149.

²¹⁰ DSU, *supra* note 7, art. 22; MATSUSHITA ET AL., *supra* note 1, at 32.

²¹¹ MATSUSHITA ET AL., *supra* note 1, at 32.

²¹² *Id.* at 33. Moreover, Article 22.3 details three options for retaliation: 1) parallel retaliation against the offending nation on the same sectors subject to the earlier dispute; 2) retaliation against different sectors, but still those covered by the same Agreement; and 3) retaliation against the complaining party across agreements. DSU, *supra* note 7, art. 22.3(a)-(c).

²¹³ DSU, *supra* note 7, arts. 22.4 - 22.8.

nation to comply with its commitments under the foundational WTO Agreement or have the offending nation face an equivalent level of "impairment or nullification."²¹⁴

Despite the advances in the dispute resolution process made through the 1994 Agreement, many developing countries still seek reform of the process through the ongoing Doha Round of WTO negotiations.²¹⁵ While the DSU is credited with "eliminat[ing] or substantially reduc[ing] the harassment of developing countries arising out of the operation of the rules," some developing countries are afraid that developed countries will use any effort to make the dispute resolution process more streamlined and binding as a trade-off for reforming subsidies and other trade distorting activities.²¹⁶

In contrast, some commentators believe that while the DSB is undeniably a judicial entity, it has sometimes crossed the line from interpreting the law to making law through its decisions.²¹⁷ This trend becomes more problematic as the politically-accountable sections of the WTO, the General Council and the Ministerial Conference, rarely move to check the DSB.²¹⁸ In addition, panels' greater consideration of precedent and custom in formulating their decisions makes the influence of the DSB, in many ways, even more pervasive than that of the General Council, as their decisions become immediately part of agreements that often take decades to fully negotiate and implement.²¹⁹ According to one expert source:

Tribunals choose to follow previous cases not only for reasons of fairness and legitimacy, but also for reasons of efficiency. Today's tribunal benefits from the work done yesterday on the same legal question; the wheel does not have to be reinvented. Finally, following precedent tends to make the law clearer and more certain, which is also of benefit to the legal system.²²⁰

²¹⁴ *Id.*

²¹⁵ See generally BHAGIRATH LAL DAS, WTO: THE DOHA AGENDA: THE NEW NEGOTIATIONS ON WORLD TRADE 54-55 (2003).

²¹⁶ *Id.*

²¹⁷ MATSUSHITA ET AL., *supra* note 1, at 43.

²¹⁸ *Id.*

²¹⁹ See *id.* at 25 (describing the use of prior DSB rulings and reasoning on future cases addressed by initial panels or the Appellate Body).

²²⁰ *Id.* at 59.

With the increasing use of the dispute resolution system, the DSB will likely only grow in importance in not just settling disputes, but also making law to fill in the gaps of the broader underlying WTO Agreement.²²¹ In order to examine the potential impacts of a broader role taken by the DSB, the next section briefly examines the United States' record in the DSB.

B. The United States and Its History in the Dispute Resolution Body

The United States has been involved as either a complaining or responding party in nearly 180 separate disputes, constituting over half of the total formal disputes brought before the DSB since its inception in 1995.²²² The United States has appeared as the complaining party 84 times and as the responding party 97 times to date.²²³ Of disputes that have been filed by the United States and have completed consideration, the United States' record is impressive—24 cases have been resolved to the U.S.'s satisfaction without completing litigation, 24 have seen the United States win on the core issue of the complaint, and there have been only 4 losses on the core issue.²²⁴ In addition, 14 cases are still outstanding, awaiting further consideration by the DSB.²²⁵

In contrast, the United States' record as responding party is much less successful, with the United States losing the core issue of the dispute on 26 occasions, compared with only 13 wins.²²⁶ Nearly half of the cases brought against the United States involve either textiles or agricultural products.²²⁷ Though many cases involve developed countries, a significant number of successful

²²¹ The outcome of *United States—Subsidies on Upland Cotton* demonstrates the growing power of the DSB to interpret critical areas of the larger WTO Agreement.

²²² See WTO, Dispute Settlement, The Disputes: Disputes by Country, *supra* note 9.

²²³ *Id.*

²²⁴ WTO, Office of the US Trade Rep., Snapshot of WTO Cases Involving the United States [hereinafter Snapshot], <http://www.ustr.gov> (highlight "trade agreements," use drop down menu and click on "global," click on "monitoring and enforcement," click on "WTO Dispute Settlement," then click "Snapshot of WTO Cases involving the U.S.") (describing the cases in more detail).

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *Id.*

cases were brought by developing countries or emerging economies, such as Brazil and India.²²⁸

Looking over the United States' involvement in the dispute resolution process, several points are at least hinted at in the numbers. First, the mandated preliminary consultation before the complainant goes to panel seems to precipitate resolution of disputes between both countries.²²⁹ Of the roughly 180 cases involving the United States, almost one-quarter have been resolved without completing the litigation.²³⁰ And while many of the cases involve the United States in dispute with another major developed country, there seems to be little reluctance on the part of either the developing world or the United States to pursue disputes against one another.²³¹ For instance, the United States pursued litigation against Venezuela, Argentina, India, and Brazil; all of these same countries plus regional allies, such as Costa Rica and Pakistan, filed claims against the United States as well.²³²

From these results, it appears that most WTO members put significant faith in the dispute resolution process, as noted by the breadth and scope of the complaints brought against the United States.²³³ There does seem to be an advantage to the complaining party within the process—the United States has fared far better as a complaining party in resolving its complaints than as the responding party.²³⁴ As one commentator stated, “[s]ince complainants win the vast majority of cases in which they are involved, it is expected that complainants will continue to bring disputes to the WTO.”²³⁵

On the other hand, where the disputes require the panel to

²²⁸ *Id.* In addition to the developing countries noted above, the United States seems to have had a contentious relationship with its NAFTA partners regarding agricultural issues. *Id.* Further, the list is littered with litigation that followed the President's decision to raise protective tariffs on steel imports in 2001. *Id.*

²²⁹ *Id.*

²³⁰ Snapshot, *supra* note 224.

²³¹ *Id.*

²³² *Id.*

²³³ *Id.*

²³⁴ *Id.*

²³⁵ Sue Mota, *The World Trade Organization: An Analysis of Disputes*, 25 N.C. J. INT'L L. & COM. REG. 75, 104 (1999).

interpret differing interpretations of the WTO Agreement or its appurtenant parts, the cases should intuitively be much closer. However, even if the margin for addressing these issues is less than the nearly 80% success rate that complaining parties once reported,²³⁶ the power of the DSB within the WTO framework to make immediate rulings coupled with the weight of the rulings as customary international law would argue for a DSB that has no decided slant to either the complaining or responding party. Otherwise, the dispute resolution process would become the key avenue for gaining and enforcing concessions, rather than through the normal negotiation process.

With the current Doha Round of negotiations at an impasse, it is possible that the dispute resolution process has already begun to perform the primary function of the General Council and the Ministerial Conference. Examining *United States—Subsidies on Upland Cotton* in some detail may shed more light on this subject.

IV. United States—Subsidies on Upland Cotton

A. Background

Following Brazil's filing of a formal complaint in 2002 to begin the formal proceedings in the upland cotton dispute, numerous outside groups recognized its importance as a bellwether for the future of WTO agriculture negotiations. For example, the British non-governmental organization (NGO) Oxfam made the link between the cotton dispute and the agriculture talks more generally, asserting that fixing U.S. cotton subsidies should be but a part of a larger reform that eliminates all export subsidies as well as a radical reformation of green box subsidies.²³⁷ In contrast, following Brazil's complaint in 2002, the National Cotton Council, the largest organization of cotton producers in the United States, responded by describing Brazil's actions as a distraction from the larger goal of a new round of trade negotiations.²³⁸ In 2003, the Chairman of the National

²³⁶ *Id.*

²³⁷ Kevin Watkins, *Cultivating Poverty: The Impact of U.S. Cotton Subsidies on Africa*, at 4 (Oxfam Briefing Paper No. 30, 2002)

²³⁸ Press Release, National Cotton Council, *NCC: Brazil's Complaints on U.S. Cotton Programs Unwarranted*, Oct. 2, 2002, <http://www.cotton.org/news/releases/2002/>

Cotton Council sharply rejected the claims of those who brought the cotton complaint:

The perception being fostered by several self-serving international organizations—that U.S. agricultural policies drive the world agricultural economy—is simply ludicrous The attempt to blame the ills of the world's developing countries on the U.S. cotton program is naive, at best. It is based on seriously flawed economics. It is misleading the leaders of many African countries. It ignores the substantial trade preferences the United States provides to African countries to enable them to develop their textile and apparel processing industries.²³⁹

The different motivations of the complaining parties complicates the dispute. Brazil is one of the rising producers of cotton in the world, and a growing competitor in the global cotton market.²⁴⁰ In contrast, the western African nations of Benin, Chad, Mali, and Burkina Faso, of which Benin and Chad supported Brazil's claims, are unlikely to be a force in the global cotton market in the near future.²⁴¹ West Africa cumulatively produces roughly 17% of the world's cotton.²⁴² Cotton, however, provides for 50-80% of their total exports, and serves as the livelihood of nearly nine million of their citizens.²⁴³ In addition, one estimate indicates that U.S. subsidies for cotton depress world cotton prices by nearly 10%, creating income losses for West African farmers of nearly \$250 million annually.²⁴⁴ So while the cotton dispute is, at its essence, an economic dispute, there is a disparate impact and interest between the complaining parties.

The United States cannot fairly be accused of being blind to the nature of the subsistence farming in sub-Saharan Africa. Congress overwhelmingly passed the African Growth and

Brazil-WTO.cfm.

²³⁹ Press Release, National Cotton Council, *NCC Supportive of Progressive Trade Policy; Concerned With Division Within World Trade Organization*, June 18, 2003, <http://www.cotton.org/news/releases/2003/Greene-trade-testimony.cfm>.

²⁴⁰ See World Markets and Trade, *supra* note 23.

²⁴¹ ACTIONAID, THE COTTON DISPUTE: A VICTORY FOR THE WORLD'S POOR FARMERS (June 17, 2004).

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ DOHA Agenda, *supra* note 11, at 17-18.

Opportunity Act (AGOA),²⁴⁵ which “provides beneficiary countries in Sub-Saharan Africa with the most liberal access to the U.S. market available to any country with which [the United States] do[es] not have a Free Trade Agreement.”²⁴⁶ This legislation provides duty and quota free treatment of certain apparel articles imported from the 37 certified Sub-Saharan African nations.²⁴⁷ Additionally, AGOA and its progeny create and extend the so-called “third country fabric provision,” which creates an incentive for AGOA nations to not only produce their own apparel, but also weave and dye their own fabric.²⁴⁸ AGOA of 2000 was expanded and clarified by the AGOA Acceleration Act of 2004.²⁴⁹ This act was passed largely because of the pending expiration of the third country fabric rule.²⁵⁰ Since the passage of AGOA, U.S. non-oil imports from the region are up 22% to nearly \$3.5 billion annually.²⁵¹

Finally, outside of the shrewd economic dealing inherent within the WTO is the even shrewder political dealing surrounding trade battles in the individual countries. For example, in Brazil, the newly elected President, Luiz Inacio Lula da Silva, criticized the incumbent government for failing to pursue a more aggressive strategy at the WTO against the United States during his election campaign.²⁵² Following his nation’s panel victory, Lula stated that “[t]his beautiful victory at the WTO will allow us to take a leap in quality, especially in the cotton producing states [;w]e have to show [the United States and the EC] that we are as competent as

²⁴⁵ African Growth and Opportunity Act of 2000, 19 U.S.C. § 3701 (2000).

²⁴⁶ African Growth and Opportunity Act: Frequently Asked Questions, *Q: How Does AGOA Benefit African Countries?*, <http://www.agoa.gov/faq/faq.html> (last visited Mar. 10, 2007).

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ AGOA Acceleration Act of 2004, 19 U.S.C.A. § 3701 (West 2005).

²⁵⁰ 150 CONG. REC. H3875, 3884-87 (daily ed. June 14, 2004) (statement of U.S. House Committee on Ways and Means Chairman Bill Thomas).

²⁵¹ OFFICE OF U.S. TRADE REPRESENTATIVE, TRADE FACTS: U.S.-AFRICA TRADE IS UP: NON-OIL AGOA TRADE EXPANDS (Mar. 8, 2005), http://www.ustr.gov/assets/Document_Library/Fact_Sheets/2005/asset_upload_file792_7354.pdf.

²⁵² *Brazil's Lula Hails "Beautiful Victory" over USA on Cotton Subsidies*, FIN. TIMES, May 2, 2004.

they are.”²⁵³ The United States was not immune to political pressures, either. In 2002, in the midst of important mid-term elections, Congress, with the support of the President, passed the 2002 Farm Bill, which greatly expanded subsidies and commodity payments for agricultural commodities, including cotton.²⁵⁴ Upon signing the bill, President Bush stated:

My administration is working hard to open up markets. I told the people, I said if you give me a chance to be the President, we're not going to treat our agriculture industry as a secondary citizen when it comes to opening up markets. And I mean that. I understand how important the farm economy is to the future of our country. To help, this new law helps keep our international trade commitments. And that's important for America to understand.²⁵⁵

In short, agriculture and its competitiveness in the global marketplace is not just an economic or legal issue, but also a political issue for policy-makers to struggle with through often dicey negotiations and elections. Without a doubt, the rhetoric of all parties before and during the dispute is perhaps more illustrative of their real motivations than their legal arguments during litigation of the dispute itself.

B. The Case Itself

On September 27, 2002, Brazil initiated the WTO dispute resolution process by requesting formal consultations with the DSB and the United States in regards to certain U.S. subsidies for domestic production of upland cotton.²⁵⁶ Within its initial request for consultation, Brazil, which was later joined by several other nations as third parties to the dispute,²⁵⁷ broadly attacked the entire

²⁵³ *Id.*

²⁵⁴ See MATSUSHITA ET AL., *supra* note 1, at 141.

²⁵⁵ Press Release, White House, President Signs Farm Bill: Remarks by the President Upon Signing the Farm Bill (Mar. 13, 2002), <http://www.whitehouse.gov/news/releases/2002/05/20020513-2.html>. Cf. DSU, *supra* note 7, art. 17.3 (stating the producers' response to Brazil's initiation of the formal dispute process).

²⁵⁶ Request for Consultations by Brazil, *United States—Subsidies on Upland Cotton*, WT/DS267/1 (Sept. 27, 2002) [hereinafter Request for Consultations by Brazil].

²⁵⁷ Dispute Settlement: Dispute DS267, *United States—Subsidies on Upland Cotton*, available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds267_e.htm.

structure of USDA commodity programs for cotton from 1999 to 2002, as well as the 2002 Farm Bill.²⁵⁸ First, Brazil targeted the Step-2, Step-3, and SCGP programs as export subsidies barred under Article 9(2)(b)(iv) of the Agriculture Agreement.²⁵⁹ Next, Brazil challenged current LDP and counter-cyclical payments as exceeding AMS caps and “amber box” limitations for payments that are linked to market prices.²⁶⁰ Finally, Brazil took the bold move of challenging new “green box” commodity programs approved in the 2002 Farm Bill, including new conservation programs, direct payments, and even drought and disaster relief payments approved by Congress from 1998 to 2001.²⁶¹ In many ways, Brazil’s initial request for consultation attacked not just U.S. cotton subsidies, but the United States’ current level of commodity support more generally, as many of the claims apply equally to all U.S. commodities.²⁶²

Following the failure of the consultation process, Brazil then requested that the DSB create a panel to begin consideration of the dispute on February 6, 2003.²⁶³ The DSB initially deferred creation of the Panel under Article 6.1 of the DSU,²⁶⁴ but was

Argentina, Australia, Benin, Canada, Chad, China, Taiwan, the European Union, India, New Zealand, Pakistan, Paraguay, Venezuela, Japan, and Thailand were all joined as third parties to the dispute. *Id.*

²⁵⁸ Request for Consultations by Brazil, *supra* note 256.

²⁵⁹ *Id.* at 2; *see also* Agriculture Agreement, *supra* note 89, annex 2; U.S. Farm Policy, *supra* note 99 (describing Article 9’s provisions limiting export subsidies for developed and developing countries).

²⁶⁰ Request for Consultations by Brazil, *supra* note 256, at 1-2; *see also* discussion *supra* Part II.C (describing what constitutes amber box payments under the WTO Agreement on Agriculture).

²⁶¹ Request for Consultations by Brazil, *supra* note 256, at 1-2; *see also* MATSUSHITA ET AL., *supra* note 1, at 137 n.158 (describing green box subsidies under the WTO Agriculture Agreement).

²⁶² Request for Consultations by Brazil, *supra* note 256. In particular, Brazil’s argument that 2002 Farm Bill amendments to LDP rates and direct payment rates, as well as the creation of the counter-cyclical payment program, moved U.S. AMS beyond its permitted level, by definition, assumes that aggregate support has increased. *Id.* Though the claim’s scope was limited to cotton, it is possible that the supposed improvements to the 2002 Farm Bill were at least a precipitant of the timing of the claim.

²⁶³ Dispute Settlement: DS 267, *United States—Subsidies on Upland Cotton*, available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds267_e.htm [hereinafter Dispute Settlement: DS 267].

²⁶⁴ *Id.*; *see also* DSU, *supra* note 7.

forced to create the panel following a second request by Brazil on March 18, 2003.²⁶⁵ In initial arguments before the panel in July 2003, as well as its eventual arguments before the Appellate Body in October 2004, Brazil made five distinct claims against the United States,²⁶⁶ each of which are described in turn below, followed by the DSB finding.

First, Brazil claimed that the United States was no longer exempt from the “peace clause” provisions of Article 13 of the Agriculture Agreement because its domestic and export subsidies exceeded its WTO commitments.²⁶⁷ Article 13 prohibits parties to the Agreement from challenging domestic support measures so long as the level of support for a commodity remains at or below agreed upon levels in the Agriculture Agreement.²⁶⁸ Brazil made two arguments: first, that U.S. cotton programs were subject to Article 13 of the Agriculture Agreement, and second, that current levels of U.S. support were larger in the 2001 marketing year than they were in the 1992 marketing year.²⁶⁹ In response, the United States argued that the peace clause was still ““exempt from actions”” and that “Brazil may not bring or maintain any action against such measures ‘based on’” the baseline 1992 Marketing Year codified in Article 13.²⁷⁰ The Panel concluded, and the Appellate Body affirmed, that Brazil sufficiently demonstrated that the United States’ current commodity support was in excess of that from the 1992 Marketing Year, and thus was no longer protected by the peace clause.²⁷¹

Next, Brazil claimed that direct payments under the 2002 Farm Bill, and the Production Flexibility payments made under the 1996 Farm Bill, failed to comply with the criteria listed under Annex 2 of the Agriculture Agreement for green box subsidies.²⁷² Brazil

²⁶⁵ Dispute Settlement: DS 267, *supra* note 263.

²⁶⁶ Panel Report, *United States—Subsidies on Upland Cotton*, WT/DS267/R (Sept. 8, 2004) [hereinafter Cotton Panel Report].

²⁶⁷ *Id.* at 2-3.

²⁶⁸ Agriculture Agreement, *supra* note 89, article 13(b)(ii).

²⁶⁹ See Cotton Panel Report, *supra* note 266, ¶¶ 7.354 - 7.355.

²⁷⁰ *Id.* ¶ 7.339.

²⁷¹ *Id.* ¶ 7.608; Appellate Body Cotton Report, *supra* note 14, ¶ 384.

²⁷² Cotton Panel Report, *supra* note 266, ¶ 3.1(i); Appellate Body Cotton Report, *supra* note 14, ¶ 363.

argued that these payments should count against the United States' support limit as measured by the 1992 Marketing Year for purposes of the peace clause.²⁷³ The United States argued that both of the direct payment programs were green box subsidies, as they were not tied to market price or other limits.²⁷⁴ The panel found, and the Appellate Body affirmed, that because direct payments to producers were contingent upon U.S. producers not planting certain program crops, the direct payments did not qualify as green box subsidies.²⁷⁵

In its third claim, Brazil argued that the Step-2 program functioned as a prohibited export subsidy and was barred under current U.S. commitments to the WTO.²⁷⁶ The United States argued that Step-2 payments are better characterized as part of its amber box domestic support program, because they are provided to domestic users as well as exporters, and are subject to "reduction commitments under Article 6" of the Agriculture Agreement.²⁷⁷ However, the panel held, and the Appellate Body affirmed, that payments to exporters under the Step-2 program were "export contingent," and were therefore inconsistent with U.S. commitments under the Agriculture Agreement.²⁷⁸ In reaching this decision the full precedential and customary weight of previous Appellate Body proceedings was brought to bear, as the Appellate Body relied on reasoning first stated in *US—Foreign Sales Corporations*²⁷⁹ to determine the contingency of U.S.

²⁷³ Cotton Panel Report, *supra* note 266, ¶ 3.2; Appellate Body Cotton Report, *supra* note 14, ¶ 363.

²⁷⁴ Cotton Panel Report, *supra* note 266, ¶¶ 3.5-.6; Appellate Body Cotton Report, *supra* note 14, ¶¶ 16-18.

²⁷⁵ Cotton Panel Report, *supra* note 266, ¶ 8.1(c); Appellate Body Cotton Report, *supra* note 14, ¶¶ 341-42.

²⁷⁶ Cotton Panel Report, *supra* note 266, ¶ 3.1(ii); Appellate Body Cotton Report, *supra* note 14, ¶¶ 526-28. *See generally* discussion, *supra* Part II.B (describing the Step-2 cotton program as payments to U.S. exporters and domestic mill users to compensate them for their purchase of higher priced U.S. cotton).

²⁷⁷ Appellate Body Cotton Report, *supra* note 14, ¶ 48; *see also* Cotton Panel Report, *supra* note 266, ¶ 3.5; Appellate Body Cotton Report, *supra* note 14, ¶¶ 47-55.

²⁷⁸ Cotton Panel Report, *supra* note 266, ¶¶ 8.1(e)-(f); Appellate Body Cotton Report, *supra* note 14, ¶¶ 582-84.

²⁷⁹ Panel Report, *United States—Tax Treatment for "Foreign Sales Corporations"—Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS108/RW, Jan. 14, 2002 (adopted Jan. 29, 2002).

payments to exporters.²⁸⁰

In its fourth claim, Brazil argued that U.S. export guarantee programs, such as GSM-102, GSM-103,²⁸¹ and the Supplier Credit Guarantee Program (SCGP),²⁸² violated the WTO Agreement on Agriculture.²⁸³ These export guarantee programs apply to nearly all U.S. agricultural products.²⁸⁴ These programs further demonstrate Brazil's intent to seek concessions on all aspects of U.S. commodity programs through its complaint. In response, the United States simply attempted to contradict the Brazilian assertions, and then argued the point largely on procedural, rather than substantive, grounds.²⁸⁵ These arguments were not especially persuasive to either the panel or the Appellate Body, which both held that the export guarantee programs did violate the United States' commitments under the Agriculture Agreement.²⁸⁶

In its fifth and final claim, Brazil argued that the subsidies provided to U.S. cotton growers "suppressed upland cotton prices in the U.S., world [,] and Brazilian markets," primarily during the 1999-2002 marketing years, which resulted in an increase in the U.S. share of the world cotton market beyond its "equitable share."²⁸⁷ In response, the United States argued that its payments

²⁸⁰ See generally Appellate Body Cotton Report, *supra* note 14, ¶¶ 578-81.

²⁸¹ See *supra* text accompanying notes 57-60 (describing the GSM 102/103 programs in greater detail).

²⁸² See *Export Credit Programs*, *supra* notes 57.

²⁸³ Cotton Panel Report, *supra* note 266, ¶ 3.1(iii); Appellate Body Cotton Report, *supra* note 14, ¶ 590; Agriculture Agreement *supra* note 89, art. 10.1 (stating that "[e]xport subsidies not listed in paragraph 1 of Article 9 shall not be applied in a manner which results in, or which threatens to lead to, circumvention of export subsidy commitments; nor shall non-commercial transactions be used to circumvent such commitments").

²⁸⁴ See generally Cotton Panel Report, *supra* note 266.

²⁸⁵ Cotton Panel Report, *supra* note 266, ¶ 3.5; Appellate Body Cotton Report, *supra* note 14, ¶¶ 56-57, 62-69. In terms of its procedural arguments, the United States argues that Brazil inadequately raised the issue of export guarantees during the consultation phase, and is subsequently blocked from raising these issues before the panel or Appellate Body. Noting the composition of the programs, it is clear that little persuasive ground was available to the U.S.'s WTO delegation on this issue.

²⁸⁶ Cotton Panel Report, *supra* note 266, ¶ 8.1(d); Appellate Body Cotton Report, *supra* note 14, ¶¶ 609-11; see also WTO Agriculture Agreement, *supra* note 89, art. 10.1.

²⁸⁷ Cotton Panel Report, *supra* note 266, ¶¶ 3.1(vi)-(viii); Appellate Body Report,

were in full compliance with its obligations under the Agriculture Agreement.²⁸⁸ Moreover, the United States contended that the surge in exports was not due to an increase in subsidies, but to a fall in domestic textile consumption.²⁸⁹

In their findings, the panel and the Appellate Body agreed that U.S. domestic support measures that were directly contingent on market price levels (including the Step-2 program and the GSM-102 and GSM-103 export guarantee programs) suppressed market prices from 1999 to 2002, which resulted in “serious prejudice” against Brazil.²⁹⁰ However, both panels declined to include U.S. direct payments and other green box subsidies as a cause of serious prejudice.²⁹¹ As a response, the panel, as affirmed by the Appellate Body, required the United States to withdraw “without delay” the specified export subsidy and Step-2 payments to prevent further prejudice.²⁹²

Following the adoption of the final Appellate Body report on March 21, 2005, the United States was required to take remedial actions on two tiers.²⁹³ First, the panel recommended that the United States withdraw those support programs identified as prohibited subsidies by July 1, 2005.²⁹⁴ The prohibited subsidies earmarked for withdrawal were export credit guarantees under GSM-102 and GSM-103, and SCGP as they apply to cotton, rice, and other crops subject to USDA commodity programs.²⁹⁵ Further, the panel report, as affirmed by the Appellate Body, also required the immediate withdrawal of Step-2 payments to exporters of U.S. cotton as well as Step-2 payments that assist

supra note 14, ¶¶ 94-96.

²⁸⁸ Cotton Panel Report, *supra* note 266, ¶ 3.6; Appellate Body Cotton Report, *supra* note 14, ¶¶ 173-76.

²⁸⁹ Cotton Panel Report, *supra* note 266, ¶ 7.1336.

²⁹⁰ Cotton Panel Report, *supra* note 266, ¶ 8.1(g)(i); Appellate Body Cotton Report, *supra* note 14, ¶¶ 763(c)(1)-(2).

²⁹¹ Cotton Panel Report, *supra* note 266, ¶ 8.1(g)(ii); Appellate Body Cotton Report, *supra* note 14, ¶¶ 763(c)(1)-(2).

²⁹² Cotton Panel Report, *supra* note 266, ¶¶ 7.1500-7.1503, 8.3(b).

²⁹³ Dispute Settlement: DS 267, *supra* note 263.

²⁹⁴ Cotton Panel Report, *supra* note 266, ¶ 8.3.

²⁹⁵ *Id.* ¶ 7.1502.

domestic users of cotton.²⁹⁶

In addition, the panel's report, as affirmed by the Appellate Body, also made recommendations on subsidies deemed "actionable" as contributing serious prejudice to the interests of Brazil during the 1999 to 2002 marketing years.²⁹⁷ Specifically, the panel stated that the United States was "obliged to take action concerning its present statutory and regulatory framework as a result of our 'present' serious prejudice finding."²⁹⁸ The programs affected by this ruling were those directly linked to price, such as the counter-cyclical payments, LDPs, and the Step-2 program.²⁹⁹ While these programs were deemed actionable by the panel's report, the final recommendation was contingent on U.S. withdrawal of the prohibited export subsidies detailed above.³⁰⁰ The panel report states:

We consider that, upon required implementation by the United States of this Panel's prohibited subsidy findings and present serious prejudice findings, the basket of measures in question may be so significantly transformed or manifestly different from the measures that are currently in question that it is not necessary or appropriate to address Brazil's claims of threat of serious prejudice³⁰¹

Despite its expansive findings of wrongdoing on the part of U.S. commodity programs and export subsidies, the panel report ultimately adopted by the DSB limits its proscriptive force to relatively minor programs—the export subsidies of GSM-102, GSM-103, and SCGP, as well as the Step-2 program as it applies to domestic users and exporters of U.S. produced cotton.³⁰² While the programs required to take immediate action were relatively few, it is equally important to note that of the four prohibited programs, only one, the Step-2 program, is specific to cotton. The other export credit programs are available to all U.S. commodities

²⁹⁶ *Id.* ¶ 7.1502.

²⁹⁷ *Id.* ¶ 7.1499.

²⁹⁸ *Id.* ¶ 7.1501.

²⁹⁹ *Id.* ¶ 8.1(g)(i).

³⁰⁰ Cotton Panel Report, *supra* note 266, ¶ 7.1503.

³⁰¹ *Id.* ¶ 7.1503.

³⁰² *Id.* ¶¶ 7.1502, 8.1(g)(i), 8.3.

scheduled for export.³⁰³ Because the withdrawal of the Step-2 payments and reform of the export guarantee programs might eliminate the harm, the panel recommended only that amber box subsidy payments be curtailed or cut to remove their potential adverse impact on the market.³⁰⁴ Unfortunately, current enforcement efforts continue to stall over the classification of these price-driven subsidy payments.³⁰⁵

C. Compliance Action and United States Response

In accordance with the DSB process, the United States stated its intention to comply with the DSB findings at a special DSB meeting on April 20, 2005.³⁰⁶ The United States indicated that it respected the finding, but would require a “reasonable period of time” to fully implement its response to panel recommendations.³⁰⁷ Currently, enforcement efforts are in flux as Brazil continues to increase political and legal pressure within the WTO to encourage U.S. compliance on the matter of its actionable amber box subsidies.³⁰⁸

Domestically, the legal effect of the DSB findings is comprehensively addressed in the Uruguay Round Agreements Act (URAA), which was approved by Congress in 1994 to implement the formation of the WTO.³⁰⁹ Among its many provisions, URAA provides that “no provision of any of the Uruguay Round Agreements, nor the application of any such provision to any person or circumstance, that is inconsistent with any law of the United States shall have effect.”³¹⁰ Further, the URAA provides that nothing in the statute “shall be construed . . . to amend or modify any law of the United States . . . or . . . to limit any authority conferred under any law of the United States . . .

³⁰³ See Cotton Panel Report, *supra* note 266 (describing the Step-2 program); *see also supra* text accompanying notes 52 & 57 (describing the GSM 102/103 and SCGP).

³⁰⁴ Cotton Panel Report, *supra* note 266, ¶ 7.1503.

³⁰⁵ Dispute Settlement: DS 267, *supra* note 263.

³⁰⁶ *Id.*

³⁰⁷ *Id.*

³⁰⁸ *Id.*

³⁰⁹ Uruguay Round Trade Agreements Act of 1994, 19 U.S.C. § 3501 (2000).

³¹⁰ 19 U.S.C. § 3512(a)(1) (2000).

unless specifically provided for in this Act.”³¹¹ The strictness of this statutory language is emphasized in the report language that accompanied the bills:

Since the Uruguay Round agreements as approved by the Congress, or any subsequent amendments to those agreements, are not self-executing, any dispute settlement findings that a U.S. statute is inconsistent with an agreement also cannot be implemented except by legislation approved by the Congress unless consistent implementation is permissible under the terms of the statute.³¹²

In short, any alteration of a U.S. statute needed to conform with a WTO or DSB finding must come from Congress. There is no automatic amendment in order to comply with changes in the WTO.³¹³ Similar provisions also apply to regulatory proceedings that might not comport with WTO cases.³¹⁴

To this end, United States Secretary of Agriculture Mike Johanns sent a package of proposed statutory reforms to Congress for consideration in July 2005.³¹⁵ Included in this package was a repeal of the Step-2 Cotton program and the termination of the GSM-103 Intermediate Export Guarantee Program.³¹⁶ Secretary Johanns also announced that the USDA would begin using a risk-based fee structure for its GSM-102 and SCGP credit programs using its designated regulatory powers to ensure compliance with the WTO ruling.³¹⁷ This package was designed to eliminate any subsidies found to be per se prohibited under the Appellate Body Report.³¹⁸

³¹¹ *Id.* § (a)(2).

³¹² H.R. REP. NO. 103-826 (I) at 25 (1994).

³¹³ *Id.*

³¹⁴ *See* 19 U.S.C. § 3533(g) (2005).

³¹⁵ Press Release, US Department of Agriculture Proposes Legislative Changes to Cotton and Export Credit Programs to Comply with WTO Findings, July 5, 2005, www.usda.gov (follow “Newsroom” hyperlink, then follow “Latest Releases” hyperlink, select from dropdown menu “July 2005;” select release dated “July 5, 2005.”)

³¹⁶ *Id.*

³¹⁷ *Id.*; *see also* Press Release, USDA Announces Changes to Export Credit Guarantee Programs to Comply with WTO Findings, June 30, 2005, www.usda.gov (follow “Newsroom” hyperlink, then follow “Latest Releases” hyperlink, select from dropdown menu “June 2005;” select release dated “June 30, 2005.”)

³¹⁸ *Id.*

Much of Johanns's proposal was included as part of the Deficit Reduction Act of 2005, which was signed into law by President Bush in February 2006.³¹⁹ This measure, which was loaded with controversial legislative riders unrelated to the cotton program, eliminated the Step-2 Cotton Program on August 1, 2006.³²⁰

Though this immediate fix to the cotton program was rapidly completed, the larger issue of comprehensive aggregate commodity support raised—and only ambiguously answered—by the Appellate Body report, still looms over Congress and the nation's agricultural community. As indicated by Mark Lange, the President of the National Cotton Council, the nation's largest cotton producer group:

[c]ertain aspects of the decision have brought on a heightened level of attention to [deliberations concerning the full implementation of the Appellate Body decision] by the U.S. agricultural community. This degree of concern could intensify as we move further down the path of compliance and, through the arbitration procedure, discover more about the longer term impact stemming from some of the Panel's relatively vague findings.³²¹

Lange also indicated that before the Appellate Body Report, USDA, and Congress "believed that as long as a country complied with the specific URAA provisions, that country would be exempt from [SCM] challenges. The Panel's decision in the Brazil case has changed this view."³²² Finally, Lange asserted that use of the SCM standard of "serious prejudice" could be "distilled to 1) the U.S. annually accounts for about 19% of the world's cotton production, and 2) the United States has trade distorting subsidies. Therefore, the United States must have committed serious prejudice to Brazil's cotton interests."³²³

Industry concerns were heightened as Brazil moved procedurally to preserve its rights to enact unilateral retaliation against the United States if Congress refused to curtail the

³¹⁹ Deficit Reduction Act of 2005, Pub. L. No. 109-171, § 1103, 120 Stat. 5 (2006).

³²⁰ *Id.*

³²¹ Mark Lange, *Brazil Cotton Case and the WTO*, <http://www.cotton.org/issues/2005/langereptica.cfm> (last visited Mar. 10, 2007).

³²² *Id.*

³²³ *Id.*

actionable “amber box” subsidies in a timely fashion.³²⁴ Following the suspension of the Doha Round talks in July 2006, Brazil requested that the compliance matter be returned to the original panel for consideration.³²⁵ Brazil made a second request to form a panel on September 28, 2006, and the DSB agreed to forward the dispute to the original panel for consideration of U.S. compliance measures.³²⁶ Though Brazil is ratcheting up pressure on the U.S. government to modify certain actionable subsidies, Brazil is still far from actually securing the right to retaliate against the United States.³²⁷ Because the Panel may delay its finding well beyond the 90 days normally allotted for compliance proceedings, there is likely sufficient time for Congress to make adjustments to farm programs to avoid as much as \$4 billion in retaliatory measures from Brazil.³²⁸

With the 2002 Farm Bill set to expire at the end of the 2007 crop year, the stage has been set for intense debate over the future of U.S. farm programs more generally. The question will be: Should Congress enact comprehensive cuts in its farm subsidies in order to comply with the unclear mandate of the Appellate Body’s report? Even before the midterm elections of November 2006, the outgoing chairman of the United States Senate Committee on Agriculture, United States Senator Saxby Chambliss (R-GA), indicated that he wanted to include measures in the next farm bill that would protect farmers from future challenges to commodity programs like that raised by Brazil.³²⁹

Already, the Bush Administration and some Members of Congress have moved to cut farm subsidies outside of the usual consideration of a five-year Farm Bill. In particular, United States Senator Charles Grassley (R-IA) renewed his effort to impose a \$250,000 per individual cap on farm program payments through an amendment to the Fiscal Year (FY) 2006 Agriculture

³²⁴ Request for the Establishment of a Panel by Brazil, *United States-Subsidies on Upland Cotton*, WT/DS267/30 (Aug. 21, 2006).

³²⁵ *Id.*

³²⁶ Dispute Settlement DS 267, *supra* note 263.

³²⁷ *Brazil to Ask for WTO Cotton Compliance Panel in September*, INSIDE U.S. TRADE, Aug. 18, 2006, Vol. 24, No. 33.

³²⁸ *Id.*

³²⁹ *Id.*

Appropriations Act.³³⁰ Though his amendment was eventually ruled out of order, Grassley argued that his proposal would have provided \$1.1 billion in savings over five years.³³¹ This amendment, like the Bush Administration's FY 2006 budget proposal to cut \$5.4 billion from farm programs,³³² has encountered sharp opposition from parts of the Farm Belt, especially "[s]outhern cotton and rice growers in the GOP's political base [that] would be hit particularly hard."³³³ Though the Administration eventually backed off its initial proposal under pressure from southern lawmakers,³³⁴ one publication noted that

[t]he proposed Agriculture budget is surprising not only for the scope of the cuts but also because the biggest losers would be cotton and rice farmers who largely hail from Southern states that strongly supported the president's re-election in November, including those in Mississippi and Texas represented by some of the most powerful members of Congress.³³⁵

Current maneuvering on the agriculture budget is but a prelude to a larger fight in 2007 over a new farm bill, as well as the nature of the United States' commitments to the WTO.³³⁶ Regardless of the results of the 2006 appropriations process, 2007 will afford Congress plenty of opportunity to focus on the nature and scope of domestic commodity payments, and their new interaction with the United States' international commitments under the WTO.

³³⁰ Editorial, *Grassley's Latest Payment Limit Amendment Defeated*, SOUTHWEST FARM PRESS, Nov. 17, 2005, available at http://southwestfarmpress.com/mag/farming_grassleys_latest_payment/index.html.

³³¹ *Id.*

³³² Dan Morgan, *Farm Subsidies May Not Face Limits; Lawmakers Would Have to Find Other Ways to Cut Costs*, WASH. POST, Apr. 15, 2005, at A23.

³³³ *Id.*

³³⁴ *Id.*

³³⁵ Andrew Martin, *Farming's Sacred Cow on Cutting Block; Agriculture Budget Calls for 5% Reduction in Subsidies*, CHI. TRIB., Feb. 5, 2005, at 10.

³³⁶ *Brazil to Ask for WTO Cotton Compliance Panel in September*, *supra* note 327.

V. Impacts of *United States-Subsidies on Upland Cotton* on the Continuing Doha Round Negotiations

A. *Deadlock Over Agriculture in General Negotiations*

After talks on modalities for agricultural subsidy reductions and market access provisions floundered in July 2006, WTO Director-General Pascal Lamy suspended the Doha Round negotiations indefinitely.³³⁷ In his remarks suspending the Round, Director-General Lamy indicated that “the gap in level of ambition between market access and domestic support remained too wide to bridge. This blockage was such that the discussion did not even move on to the third leg of the triangle—[non-agricultural market access].”³³⁸ In assessing the blame for the collapse of the talks, one source assigned responsibility broadly:

[n]o one country is to blame[;] many of the participants are culpable. India wanted fewer farm subsidies and lower tariffs but was unwilling to reduce barriers to farm goods and industrial products; the EC wouldn't cut its farm tariffs; America, the animating spirit behind earlier trade rounds, declared that a bad deal was worse than no deal at all—and meant it. The underlying rationale of unilateral trade liberalisation had been buried and forgotten long ago.³³⁹

Following suspension of the talks, there have been some signs of life for the future of the Doha Round, at least from the usually optimistic Director-General.³⁴⁰ In late 2006, Director-General Lamy indicated that informal talks were continuing, and that if renewed engagement by party nations continued over the winter, the negotiating parties “could stay on track to take this Round to a successful conclusion next year.”³⁴¹ While it is possible that the

³³⁷ WTO, Trade Negotiations Committee, DG Lamy: Time Out Needed to Review Options and Positions, http://www.wto.org/english/news_e/news06_e/tnc_dg_stat_24_july06_e.htm.

³³⁸ *Id.* Non-agricultural market access includes negotiation on services, intellectual property, and other trade issues of import to developed countries.

³³⁹ *The Future of Globalisation*, *ECONOMIST*, July 29, 2006, at 11.

³⁴⁰ WTO, General Council, Lamy: “We Can Stay on Track to Successfully Conclude the Round Next Year,” http://www.wto.org/english/news_e/news06_e/tnc_chair_report_14dec06_e.htm.

³⁴¹ *Id.*

major negotiating positions of the party nations have changed in the wake of July's suspension of talks, any major developments have gone unreported—even Director-General Lamy indicates that “no real changes in numbers, notably in agriculture domestic support or tariff protection [,] have shown up in these discussions so far.”³⁴²

It is then unsurprising that the composition of the WTO General Body will continue to be a chief determinant for the tenor and scope of the reform proposals currently under consideration. In general, the United States and the European Communities prefer broader reform packages that enhance market access, while developing countries, which constitute the majority of the General Body, prefer to focus on decreasing subsidies provided to producers in developed countries, with little interest beyond cotton and other sensitive crops.³⁴³ As demonstrated by July's suspension, it is unclear whether the developed or the developing countries are really driving the negotiations forward.

To demonstrate the gulf between developed and developing countries, consider the different approaches taken by the United States and the “West African Four,” which are Benin, Burkina Faso, Chad and Mali,³⁴⁴ to the agriculture debate.³⁴⁵ First, the United States, with the support of major U.S. producer groups,³⁴⁶ has called for substantial cuts in domestic support and export subsidies in exchange for cuts in protective tariffs which block

³⁴² *Id.*

³⁴³ See, e.g., Office of the U.S. Trade Rep., Doha Dev. Agenda Policy Brief, *U.S. Proposal for Bold Reform in Global Agriculture Trade* (Dec. 2005), http://www.ustr.gov/assets/Document_Library/Fact_Sheets/2005/asset_upload_file281_8526.pdf (describing the United States' position); WTO Cotton Sub-Committee, *Two Cotton Proposals for Hong Kong Conference Discussed* (Nov. 18, 2005), http://www.wto.org/english/news_e/news05_e/cotton_18nov05_e.htm (describing the West Africa Four's proposal).

³⁴⁴ Of the West Africa Four, Benin and Chad were complaining parties in *United States—Subsidies on Upland Cotton*. Appellate Body Cotton Report, *supra* note 14.

³⁴⁵ See NARLIKAR, *supra* note 143, at 34-39 (describing the formation and dynamics of developing country voting blocs within the WTO).

³⁴⁶ See generally Statement by Bob Stallman, President, American Farm Bureau Federation, Regarding Conclusion of Hong Kong Ministerial World Trade Talks (Dec. 19, 2005), <http://www.fb.org> (highlight “newsroom,” select hyperlink “news releases,” select hyperlink “2005 news releases,” select link “Dec. 29, 2005”).

market access for American agricultural products.³⁴⁷ Specifically, the United States calls for a reduction of tariffs by developed countries of 55-90%, with all tariffs capped at 75%.³⁴⁸ The cuts are deemed to be “progressive,” with developing countries forced to cut tariffs less through differential and preferential treatment, provided they meet certain criteria.³⁴⁹

Further, the United States’ proposal calls for the termination of all export subsidies, including direct export subsidies, and export credit programs that allow repayment after 180 days, by 2010.³⁵⁰ Finally, the United States calls for significant reductions in domestic crop support over the next five years, with the United States cutting payments by a total of 53%, and the EC cutting payments by 75%.³⁵¹ Specifically, the proposal calls for a 60% reduction in U.S. amber box payments, and an 83% reduction in EC amber box payments.³⁵² Reductions in the trade-distorting amber box payments that came to the fore in *United States—Subsidies on Upland Cotton* are coupled with strict limitations of blue box payments to a percentage of total production.³⁵³

The Food and Agricultural Policy Research Institute (FAPRI) at the University of Missouri published a study demonstrating the potential impact of full implementation of the United States’ WTO proposal for subsidy reform on net farm income.³⁵⁴ If the United States unilaterally implemented its proposal without corresponding concessions from the rest of the world, net farm income in the United States would decrease by 3.6% between 2012-2014, and if the proposal was fully implemented by all WTO member nations,

³⁴⁷ *U.S. Proposal for Bold Reform in Global Agriculture Trade*, *supra* note 343.

³⁴⁸ *Id.*

³⁴⁹ *Id.* It is interesting to note that the criteria for receiving “differential and preferential treatment” is not defined in the U.S. plan, perhaps reserving room for negotiation. *Id.*

³⁵⁰ *Id.*

³⁵¹ *Id.*

³⁵² *Id.*

³⁵³ *U.S. Proposal for Bold Reform in Global Agriculture Trade*, *supra* note 343.

³⁵⁴ FOOD AND AGRICULTURAL POLICY RESEARCH INSTITUTE (FAPRI), POTENTIAL IMPACTS ON U.S. AGRICULTURE OF THE U.S. OCTOBER 2005 WTO PROPOSAL, at 24, FAPRI-UMC REPORT #16-05 (Dec. 15, 2005).

net farm income could increase by as much as 6.5%.³⁵⁵ With this in mind, it is no wonder U.S. interests prefer no deal to a bad deal. Only if other members of the WTO provide market access to U.S. agricultural products will there be a benefit to U.S. farmers, whose support is necessary to secure passage of most any trade deal through Congress.³⁵⁶

In contrast, the West African Four have limited their proposals to those centering on cotton. Specifically, just before the Hong Kong Ministerial took place in December 2005, these nations called for the immediate elimination of all export subsidies for cotton, as well as an 80% reduction of trade-distorting amber box payments by the end of 2006, leading to the complete elimination of amber box payments for cotton by 2009.³⁵⁷ In addition, the West African proposal calls for “substantial improvements” in market access for least-developed nations, as well as an international emergency fund to bolster low cotton prices.³⁵⁸ In his presentation of this proposal, the ambassador from Benin stated that the West African Four “hope[d] the European Union and United States will bring more to the table in Hong Kong so that the conference can produce concrete results.”³⁵⁹

What is most striking about these proposals is how they differ on their fundamental approaches to the issue—the United States views the agriculture negotiations comprehensively, and calls for modest concessions from developing countries in exchange for expansive reform of developed countries’ subsidy programs.³⁶⁰ In contrast, the West African Proposal appears to demand unilateral concession from the developed world on a moral theory, instead of a balanced negotiation posture—there are no concessions, just demands.³⁶¹ While the legitimacy of these demands hinges on the

³⁵⁵ *Id.* at iii-v. According to the study, the extent of the gain in farm income garnered by the U.S. proposal will depend on the extent of U.S. reforms to direct commodity payments to farmers; if direct payments are eliminated entirely, the gain in farm income would be reduced. *Id.*

³⁵⁶ See generally *In the Twilight of Doha*, *ECONOMIST*, July 29, 2006, at 64.

³⁵⁷ *Two Cotton Proposals for Hong Kong Conference Discussed*, *supra* note 343.

³⁵⁸ *Id.*

³⁵⁹ *Id.*

³⁶⁰ *U.S. Proposal for Bold Reform in Global Agriculture Trade*, *supra* note 343.

³⁶¹ *Two Cotton Proposals for Hong Kong Conference Discussed*, *supra* note 343

perspective of the observer and is outside the scope of this Comment,³⁶² developing countries have shifted the Doha Round agenda from one of multilateral trade negotiation to a forum publicizing their social justice and individual development interests.

B. United States—Subsidies on Upland Cotton: Response by the Developing World and the United States

Given that the developing world's emphasis is on securing, rather than offering, concessions in trade negotiations, it is only logical that these countries seek to advance their agenda through a forum where consensus is not required. Regardless of the substance of the Appellate Body's recommendations, it is clear that *United States—Subsidies on Upland Cotton* was a tremendous win for developing countries as they look to the future. Perhaps most important is the fundamental shift in the DSB's position on the "peace clause" and the interaction of the Agriculture Agreement and SCM when considering agriculture disputes in the future.³⁶³ As indicated by the U.S. agriculture community, they were caught off-guard by the interpretation and new limits placed on amber box subsidies reached by the Appellate Body.³⁶⁴ In particular, these concerns focus on the relatively vague notions of "serious prejudice" that can deeply affect treatment of "amber box" domestic commodity support in the United States.³⁶⁵

Developing countries, emboldened by the cotton decision, are moving to secure further concessions.³⁶⁶ Uruguay's envoy to the WTO recently announced that his country had made the decision

(describing the West Africa Four's proposal).

³⁶² It is important to note that Benin, Chad, and Mali, three of the West Africa Four, are also AGOA nations, and already receive preferential trade treatment on a variety of apparel and textile related products. See *supra* Part IV.A.

³⁶³ See Cotton Panel Report, *supra* note 266, ¶ 7.1503.

³⁶⁴ See *Lange*, *supra* note 321.

³⁶⁵ *Id.* This point is put into particularly stark terms by efforts by influential members of Congress to adjust "amber box" subsidy payments to meet the new constraints raised by *United States—Subsidies on Upland Cotton*. See *supra* text accompanying note 294.

³⁶⁶ See, e.g., Bill Lambrecht, *U.S. Faces New Threat at WTO on Rice; Uruguay Aims to Mimic Brazil's Successful Fight of Subsidies on Cotton*, ST. LOUIS POST-DISPATCH, Aug. 7, 2005, at B1.

to move forward with a complaint against the United States for rice subsidies.³⁶⁷ While Uruguay has yet to file a formal complaint, the Uruguayan delegate indicated that its potential complaint could “resemble Brazil’s successful cotton challenge.”³⁶⁸ Though Uruguay has backed off from its combative posture because it would be difficult to prove damages in a time of high worldwide rice prices, the blueprint for a successful argument against the United States’ amber box subsidies is still relevant here.³⁶⁹

In addition, developing countries are attempting to strengthen their already strong hand in DSB matters³⁷⁰ by seeking a “developing country pays” system of compensation following successful DSB complaints.³⁷¹ These new proposals come in the face of new concerns with possible “legislating through the new dispute settlement system.”³⁷² The old system of dispute settlement under the GATT made use of consensual negotiations between the parties to place considerable pressure on the offending nation to change.³⁷³ In contrast, the more binding panel decision of the DSB moves away from a consensus-based approach to one that usually finds the winner of a case demanding that the loser fully comply with the panel’s recommendations.³⁷⁴ Further strengthening of a DSB process that already favors the complaining party will likely embolden developing nations to move forward with their development agenda through the DSB deadlocked multilateral negotiations.

These trends, as well as the failure of the Doha Round to produce tangible progress in comprehensive trade liberalization, have provided added impetus to the United States’ effort to secure

³⁶⁷ *Id.*

³⁶⁸ *Id.*

³⁶⁹ *USTR Backs Off from Uruguay Rice Talks as Threat of Case Lessens*, INSIDE U.S. TRADE, Sept. 29, 2006, Vol. 24, No. 39.

³⁷⁰ See generally Mota, *supra* note 235, at 104 (1999) (indicating that the success rate for countries bringing a complaint under the DSU is relatively high).

³⁷¹ DAS, *supra* note 215, at 75-78.

³⁷² Robert E. Baldwin, *Key Challenges Facing the WTO*, in DOHA AND BEYOND: THE FUTURE OF THE MULTILATERAL TRADING SYSTEM 53-54 (Mike Moore, ed., 2004).

³⁷³ *Id.* at 54.

³⁷⁴ *Id.*

immediate gains through bilateral and multilateral trade agreements. Following the precedent set by the North American Free Trade Agreement (NAFTA) in the 1990's, the Bush Administration has pursued negotiations independent from the WTO with a wide range of countries.³⁷⁵ In many cases, these agreements evidence a larger political strategy relevant not only to current proceedings in the WTO, but also the larger fight against global terrorism.³⁷⁶ With current bilateral negotiations continuing between several nations, the United States is moving forward with its own national trade agenda even as WTO talks continue to founder.³⁷⁷

The United States' ability to engage in any trade negotiations, whether through the WTO or with strategic partners, will be constrained should it fail to renew Trade Promotion Authority (TPA) before its expiration in June 2007.³⁷⁸ As authorized by the Trade Act of 2002,³⁷⁹ TPA gives the President authority to enter into and complete trade negotiations, allowing Congress only an up or down vote without the possibility of amendment on the final agreement.³⁸⁰ Of course, should TPA expire, Congress would then be able to amend the agreements to reflect regional or political concerns, which could ultimately upset the delicate balance of a

³⁷⁵ See, e.g., Office of the United States Trade Representative, *Bilateral Trade Agreements*,

http://www.ustr.gov/Trade_Agreements/Bilateral/Section_Index.html (last visited Mar. 10, 2007).

³⁷⁶ The United States has moved to expand its free trade zone southward through the Central America-Dominican Republic Free Trade Agreement (CAFTA), the Peru Trade Promotion Agreement and the Chile Free Trade Agreement, which applies additional pressure on Brazil to enter negotiations for a new Free Trade Area of the Americas. See *id.* Moreover, recent completion of free trade agreements with Israel, Morocco, Bahrain, Jordan, and Oman possibly indicate an economic reward for those nations who have proved to be of assistance through the United States' war on global terrorism, and its action in Iraq. See *id.* Similar motivations could also be at work in the 2004 U.S.-Australia Free Trade Agreement. See *id.*

³⁷⁷ See, e.g., United States Trade Representative, *Trade Facts, Facts on the U.S.-Thailand Free Trade Agreement Negotiations* (July 11, 2005), http://www.ustr.gov/assets/Document_Library/Fact_Sheets/2005/asset_upload_file994_7853.pdf.

³⁷⁸ *Revival of Doha Round May Depend on TPA*, J. COM., July 31, 2006, at 8.

³⁷⁹ Trade Act of 2002, 19 U.S.C. §§ 3803-3805 (2006).

³⁸⁰ The White House, *What is Trade Promotion Authority?*, <http://www.whitehouse.gov/infocus/internationaltrade/talkers.html> (last visited Mar. 10, 2007).

carefully negotiated deal.³⁸¹ With the President's party losing control of Congress in the 2006 elections, some commentators are already calling renewal of TPA a "dead letter," which might spur a renewal of multilateral talks before TPA expires.³⁸²

With the broad gulf remaining between negotiating parties in the current Doha Round, the expiration of TPA looming in mid-2007, and pressures to enact a new Farm Bill that fully complies with WTO strictures, it appears that U.S. agriculture is facing the worst of all scenarios delineated by the FAPRI study—reduction of domestic subsidies without a corresponding increase in market access around the world.³⁸³ Though *United States—Subsidies on Upland Cotton* is by no means a "checkmate" against the enormous negotiating power held by the United States in the WTO, it might have the effect of achieving one of the key goals sought by the developing world—reducing the subsidies provided by a prominent developed country.

VI. Conclusion

Clearly, the DSB's adoption of the Appellate Body report in *United States—Subsidies on Upland Cotton* is a major milestone in not only the future of the current Doha Round of trade negotiations, but also the shape and scope of the WTO itself. At the same time that the WTO is wracked by contention relating to basic talks over agriculture and textiles, the dispute resolution process is quietly becoming the epicenter for the trade negotiations themselves. As confidence grows in the capability of the DSB, and as further decisions grow in customary weight, it is possible that "interpreting" and "enforcing" the current agreement may become as important as creating a new program of reforms through general negotiations.

Current dispute resolution proposals emphasize greater enforcement powers given to the DSB, making its opinions more transparent as well as compulsory on subject parties.³⁸⁴ As this

³⁸¹ *Id.*

³⁸² *US Election Casts Cloud over Bush Trade Drive*, TURKISH DAILY NEWS SOURCE: FIN. TIMES INFO. LTD, Oct. 15, 2006, available at <http://www.turkishdailynews.com.tr/article.php?enewsid=56610>.

³⁸³ See *supra* text accompanying note 314.

³⁸⁴ See DAS, *supra* at note 215, at 54-55.

process develops, it will be important to consider whether a detached international entity such as the DSB can maintain the credibility needed to survive the political ramifications that result from its decisions in the member countries. The WTO is at a crossroads between the consensus-oriented comprehensive negotiations of its General Council, and the immediate concessions that usually result from complaints filed with the DSB.

Recent DSB matters continue to not only frame but advance the debate around negotiations within the General Council. If this pattern continues, the DSB might supplant the General Council as the chief means of exacting concessions from other nations. Can the growing confidence in the DSB be sustained as it grows in relevance and authority, or will the center fall through, resulting in a lack of respect for panel findings? Given the current trajectory of negotiations and proceedings in the DSB, this is certainly a question that will be answered sooner rather than later.

While developing nations might find immediate benefit through shifting the focus of the WTO from multilateral, consensus-based negotiation to a forum for unilateral concession and one-sided economic development, it is the finest of lines to walk. The United States' unflinching commitment to a strategy of multilateral concession and broad-based reform, augmented with unilateral charity in the form of AGOA and other development initiatives, provides a potential glimpse of U.S. policy in a future with a broken WTO.

The fundamental issue raised by the continued impasse is that nations now seem to believe that opening their markets to imports is somehow a "concession," rather than a benefit to the large majority of their citizens.³⁸⁵ As one source rightly states, "[m]ultilateral liberalisation is a sort of jujitsu that uses exporters' determination to get into foreign markets to overwhelm domestic lobbies that would sooner keep home markets closed."³⁸⁶ The current effort to turn the Doha Round into a moral effort aimed at the developing world³⁸⁷ has only further entrenched the political

³⁸⁵ *The Future of Globalisation*, *supra* note 339, at 11.

³⁸⁶ *Id.*

³⁸⁷ See, e.g., *Two Cotton Proposals for Hong Kong Conference Discussed*, *supra* note 343 (describing the West Africa Four's proposal).

positions of negotiating parties, instead of focusing attention on the real purpose of trade liberalization: tearing down political impediments through multilateral agreements to make real improvements in the economic future of the disadvantaged.³⁸⁸

As a result, the real impact of *United States—Subsidies of Upland Cotton* is only to further the current “penny-wise, pound foolish” approach to the current Doha Round that allows politicians victories at home as they sacrifice real economic gains at the negotiating table. So while the developing world can rightly celebrate its largely rhetorical victory in tearing down inequitable subsidies today, it has also eliminated a key bargaining chip from future talks and added further contentiousness to the negotiations. In the end, if developing countries continue to use the dispute resolution system, which was designed to provide a deterrent against renegeing on multilateral commitments—as a means of seeking unilateral concession—the result might be the preclusion of a future comprehensive agreement that would make more than just a political impact. Political victories might have short-term value, but cannot fix the systemic economic issues that continue to plague developing countries. Multilateral trade liberalization, however, will.

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³⁸⁸ Obviously, this is a point of some contention. However, several texts provide balanced theoretical analysis of the general benefits and costs of trade liberalization. See generally RICHARD E. CAVES & RONALD W. JONES, *WORLD TRADE AND PAYMENTS: AN INTRODUCTION* 24-29 (1981) (putting forth the traditional theoretical justification for trade, and the economic solution for market distortions); RONALD FINDLAY, *INTERNATIONAL TRADE AND DEVELOPMENT THEORY* 1-8 (1973) (providing historical background for the theoretical analysis of trade, and its implications on the development agenda); *THE GAINS FROM TRADE AND THE GAINS FROM AID: ESSAYS IN INTERNATIONAL TRADE THEORY* 203 (Murray C. Kemp, ed. 1995) (abstracting away from conventional trade models to demonstrate that free trade has economic benefit even in a marketplace with significant economic distortion).

